TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~316~~. 57

R. L. WALKER, JAMES McMURRAY, CHARLES HOWARD, AND A. J. PARTRIDGE, PLAINTIFFS IN ERROR,

vs.

E. COLLINS AND W. H. BRETCH, PARTNERS AS COLLINS & BRETCH.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JANUARY 15, 1894.

(15,484.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 26, 1895.

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1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, A. D. 1893, of said court, begun and held at the United States court-house, in the city of Saint Louis, Missouri, on the first Monday in December, it being the fourth day of December, A. D. 1893, before the Honorable Henry C. Caldwell and Honorable Walter H. Sanborn, circuit judges, and Honorable Amos M. Thayer, district judge.

Test:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the 18th day of July, A. D. 1893, a transcript of record, in pursuance to a writ of error directed to the circuit court of the United States for the district of Kansas, in a certain cause wherein R. L. Walker *et al.* are plaintiffs in error and E. Collins *et al.*, defendants in error, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit; which said transcript of record is in the words and figures following, to wit:

a In the United States Circuit Court of Appeals for the Eighth Circuit.

Stipulation.

R. L. WALKER, JAMES McMURRAY, CHAS. HOWARD AND A. J. PARTRIDGE, Plaintiffs in Error,

vs.

E. COLLINS AND E. BRETCH (Partners as Collins & Bretch), Defendants in Error.

It is hereby agreed by and between the parties to this cause that the invoice and itemized statement, which it Exhibit "A," attached to the petition or complaint, which sets forth the cause of action of the plaintiff, shall not be printed with the record in this cause, but the body of said petition or complaint and the balance of the record shall be printed, after excluding Exhibit "A," which is said invoice.

W. E. BROWN,
Attorneys for Plaintiffs in Error.

BOWMAN & BUCHER,
Attorneys for Defendants in Error.

R. L. Walker et al. vs. Collins & Bretch. Stipulation. Filed Aug. 7, 1893. John D. Jordan, Clerk.

1 UNITED STATES OF AMERICA—ss.

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the November term, 1892, thereof, between E. Collins and W. A. Bretch, partners as Collins & Bretch, as plaintiffs, and R. L. Walker, James McMurray, Charles Howard and A. J. Partridge, as defendants, a manifest error hath happened, to the great damage of the said R. L. Walker, James McMurray, Charles Howard and A. J. Partridge, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things

concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the 19th day of July, 1893, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 20th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

The Seal of the Circuit Court of the United States, District of Kansas. 1862.

Issued at office in the City of Topeka with the seal of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, dated as aforesaid.

GEO. F. SHARITT,
Clerk Circuit Court United States, First Division of the Judicial District of Kansas.

Allowed by

JOHN A. RINER, *Judge.*

Return to Writ.

UNITED STATES OF AMERICA,
FIRST DIVISION OF THE
JUDICIAL DISTRICT OF KANSAS. } ss.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said Circuit Court, at office in the City of Topeka, this 21st day of June, A. D. 1893.

The Seal of the Circuit Court of the United States, District of Kansas. 1862.

GEO. F. SHARITT,
Clerk of said Court.

No. 6510. United States Circuit Court, First Division of the Judicial District of Kansas. Collins & Bretch vs. R. L. Walker et al. Writ of Error to the Circuit Court of the United States for the First Division of the Judicial District of Kansas. Filed 22d day of May, 1893. Geo. F. Sharitt, Clerk.

2 In the District Court of Harvey County, Kansas.

Petition.

E. COLLINS AND W. H. BRETCH (Partners as Collins & Bretch), Plaintiffs,

vs.

R. L. WALKER, CHARLES HOWARD, JAMES McMURRAY AND A. J. PARTRIDGE, Defendants.

The plaintiffs complain and allege that at all the times herein mentioned, they were and now are partners, doing business in the City of Newton, Kansas, under the firm name and style of Collins & Bretch.

Plaintiffs further say that heretofore, and on the 18th day of April, 1890, they were the owners and lawfully possessed of certain goods, wares and merchandise, consisting of hats, caps, collars, cuffs, shirts, gents' underwear, hosiery, trunks, valises, piece goods, trimming, neck-wear, handkerchiefs, coats, vests, gloves, rubber coats, jackets, overalls, umbrellas, one fire-proof safe, show-cases, counters and shelving, the same being the stock of gent's furnishing goods, merchant tailoring goods, merchandise, counters, shelving, store fixtures and show-cases heretofore kept by the plaintiffs, and on the day last above-mentioned, kept by them, in the lower storeroom on Main Street, in the City of Newton, Harvey County, Kansas, and numbered 509, and being in the stone and brick building located and situated on lot Number 10, in block Number 38, in said city, and all of the value of ten thousand dollars ($10,000), an itemized statement of which said goods, wares and merchandise, personal property heretofore mentioned, is hereto attached, marked "A," and made a part hereof.

Plaintiffs further say, that being the owners and rightfully in the possession of said property as aforesaid, and on the day last above-mentioned, the said defendants, without right or authority so to do, and against the plaintiffs' will and consent, entered the plaintiffs' said storeroom where said property was kept as aforesaid, and then and there took forcible possession of all of said goods, wares, property and merchandise, and then and there unlawfully deprived plaintiffs of the same, and then and there unlawfully con-

verted and disposed of the same to their, the said defendants' own use and benefit, to the plaintiffs' damage in the sum of $10,000.

Wherefore plaintiffs pray judgment against the said defendants for the sum of $10,000, their damages sustained as aforesaid, and the costs of this action.

BOWMAN & BUCHER,
Attorneys for Plaintiffs.

Indorsed on back. No. 4159. Collins & Bretch, plaintiffs, vs. R. L. Walker et als., defendants. Petition. Filed Apr. 18th, 1890. W. J. Puett, Clerk District Court.

* * * * * * *

3 In the District Court of Harvey County, Kansas.

Bond for Costs.

COLLINS & BRETCH, Plaintiff,
vs.
R. L. WALKER ET AL., Defendants.

We and each of us enter as security for costs and undertake that the above-named plaintiff will pay all costs which may accrue in the above-entitled action, in case said plaintiff shall be adjudged to pay them. Or in case the same can not be collected from the above-named defendant, if judgment should be rendered against such defendant, that the said plaintiff will pay the costs made by said plaintiff in said action.

W. H. BRETCH,
C. R. McLAIN.

Approved by me this 18th day of April, 1890.

[SEAL] W. J. PUETT, *Clerk.*

Indorsed on back: Bond for costs. Filed April 18, 1890. W. J. Puett, Clerk District Court.

Precipe for Summons.

The Clerk of said court will issue summons in the above-entitled action to the sheriff of Harvey County, Kansas, returnable according to law. Amount claimed, $10,000, with 6 per cent interest from April, 1890.

BOWMAN & BUCHER,
Attorneys for Plaintiff.

Indorsed on back: Precipe for summons. Filed April 18, 1890. W. J. Puett, Clerk District Court.

4 STATE OF KANSAS, } ss.
HARVEY COUNTY. }

The State of Kansas, to the Sheriff of Harvey County, greeting:

You are hereby commanded to notify R. L. Walker, Charles Howard, James McMurray and A. J. Partridge that they have been sued in the District Court within and for the County of Harvey, in the Ninth Judicial District of the State of Kansas, and must answer the petition filed by the plaintiffs, E. Collins and W. H. Bretch, partners as Collins & Bretch, on or before the 19th day of May, 1890, or the said petition will be taken as true and judgment rendered accordingly. And return this writ on the 28th day of April, 1890.

In witness whereof, I have hereunto signed my name and affixed the seal of said court at my office in Newton, Kansas, in said county, this 18th day of April, 1890.

[SEAL]

W. J. PUETT,
Clerk of the District Court.

Indorsed. No. 4159. Summons. Collins & Bretch, plaintiff, vs. R. L. Walker, et al., defendants. If the defendant fail to answer the plaintiff will take judgment for $10,000, with interest thereon at the rate of 6 per cent per annum from the 18th day of April, 1890, and costs of suit. W. J. Puett, Clerk, by ....., Deputy Clerk.

Note.—If the defendant fails to appear judgment can not be rendered for a larger amount and the costs. G. S. 1868, Ch. 80 §59. Issued April 18th, 1890. Returnable April 28th, 1890. Filed April 19, 1890. W. J. Puett, Clerk. Sheriff's fees. Serving summons, first person, .50; 1 additional person, .25; 2 cop. of summons, .50. Total, $1.25.

Received this writ this 18th day of April, 1890, at .. o'clock .. M., April 18, 1890. Served the same by delivering a copy thereof with the indorsement thereon duly certified to the within-named defendants, Charles Howard and A. J. Partridge personally.

E. E. POLLARD, *Sheriff.*

By N. C. GROOM, *Deputy.*

April 18, A. D. 1890. I can not find R. L. Walker and James McMurray in my county; not summoned.

E. E. POLLARD, *Sheriff.*

By N. C. GROOM, *Deputy Sheriff.*

5 In the District Court of Harvey County, Kansas.

Answer.

E. COLLINS AND W. H. BRETCH (Partners as Collins & Bretch), Plaintiffs,
vs.
R. L. WALKER, CHARLES HOWARD, JAMES MCMURRAY AND A. J. PARTRIDGE, Defendants.

Come now the defendants, R. L. Walker, Charles Howard, James McMurray and A. J. Partridge, and for their answer to the plaintiff's petition herein filed say:

First. That they deny each and every allegation, matter and thing in said petition contained, except as hereinafter admitted.

Second. And for a second and further defense these defendants say that they admit that the defendants, Charles Howard and A. J. Partridge, took possession of and converted to their own use a portion of the goods mentioned and described in the plaintiff's petition.

These defendants further say that the defendants, R. L. Walker and James McMurray, had nothing to do whatever, personally and directly, with the taking and converting of said goods by their co-defendants, Charles Howard and A. J. Partridge. These defendants further say that the defendant, R. L. Walker, is now and has been for more than six months last past the duly appointed, qualified and acting Marshal of the United States for the District of Kansas. That the defendants, Charles Howard, James McMurray and A. J. Partridge, are now and have been at all the times mentioned in the plaintiff's petition and at all times herein mentioned the duly appointed, qualified and acting deputies of the said R. L. Walker as United States Marshal for the District of Kansas. That the defendants, Charles Howard and A. J. Partridge, took possession of the portion of the goods mentioned and described in the plaintiff's petition, which defendants admit they took by virtue of their being Deputy United States Marshals for the District of Kansas, and by virtue of no claim or right of their own, personally. That when the said defendants, Charles Howard and A. J. Partridge, took said goods (meaning that portion which they did take described in plaintiff's petition), they took the same by virtue of an order of attachment issued out of the Circuit Court of the United States for the District of Kansas in a certain action therein pending, in which E. H. Van Ingen & Co. were plaintiffs and H. Cannon was defendant. That said defendants Howard and Partridge had received said

order of attachment from the Clerk of the Circuit Court of the United States for the District of Kansas, and it was by virtue of said order of attachment and by virtue of their official duties and position as United States Deputy Marshals for the District of Kansas that they took and seized the goods which they did take and convert to their own use. Said goods being a portion of the goods mentioned and described in the plaintiff's petition.

And these defendants further say that said goods which were seized by said Howard and Partridge were seized and taken by them under no other claim, right or pretense, except solely by virtue of said order of attachment and by virtue of their authority under said order of attachment as United States Deputy Marshals for the District of Kansas. And defendants further say that the defendants, Howard and Partridge, have no other defense to this action except their jurisdiction under said writ of attachment and their right to take said goods under said writ; and that said plaintiffs were not entitled to the possession of said goods as against the defendants, Howard and Partridge, with said order of attachment.

And these defendants further say that they seized said goods as the property of the defendant in said order of attachment, to wit: H. Cannon, and levied upon the same and made a[t] appraisement of the same all according to law and according to the commands of said writ. That they seized and took possession of none of the goods whatever, mentioned and described in the plaintiff's petition except those which they took under and by virtue of said order of attachment and under and by virtue of their authority thereunder as Deputy United States Marshals of
6 the District of Kansas. That the defendants, Howard and Partridge, took possession of said goods under said authority. And these defendants further say that whatever right or title the plaintiffs had or have to said goods they got by virtue of a pretended transfer to them by said H. Cannon, the defendant in said order of attachment, which was made for the purpose of hindering, delaying and defrauding the creditors of the said H. Cannon, which the plaintiffs well knew at the time they pretended to have purchased said goods. That said goods were therefore liable to be seized by virtue of said order of attachment as the property of the said H. Cannon.

And these defendants further say that said order of attachment was duly and regularly and properly issued by the Clerk of said Circuit Court of the United States for the District of Kansas. That the Circuit Court of the United States for the District of Kansas had jurisdiction of the subject matter of said suit of E. H. Van Ingen & Co. against H. Cannon and for the parties thereto, and had jurisdiction to issue and allow

said order of attachment. And that it was duly and properly allowed and issued.

These defendants further say that the defendant, R. L. Walker, was absent from the State and the District of Kansas, at the time said order of attachment was issued and delivered, at the time said goods were seized by the defendants, Howard and Partridge, and at the time they converted the same. And had no knowledge whatever of the commencement of said suit in which said order of attachment and no knowledge whatever of the seizure of said goods thereunder, and never instructed the defendants, Howard and Partridge, to seize the same.

And these defendants further say that the defendant, James McMurray, never had anything to do with the seizure of said goods by said defendants, Howard and Partridge, and never gave any instructions to said Howard and Partridge to seize said goods. That said order of attachment, after being issued by the Clerk of the Circuit Court of the United States for the District of Kansas, was delivered to the defendant, James McMurray, as United States Deputy Marshal for the District of Kansas. That he delivered the same to the defendant, Charles Howard, with instructions to execute the same according to law, but did not instruct him to seize the goods which the said Charles Howard did seize under said writ.

And these defendants further say that, being entitled to take possession of said goods by virtue of said order of attachment, the said defendants, Howard and Partridge, proceeded so to do, but were kept out of the possession of the same for a long time by the plaintiffs, and thereby the said defendants, Howard and Partridge, were greatly damaged in not being able to seize the same as soon as they might have done so, and by reason of the plaintiffs keeping the said Howard and Partridge out of the possession wrongfully as aforesaid, and said defendants were damaged in the sum of six thousand dollars.

Wherefore, the defendants pray judgment against the plaintiffs for the sum of $6000.00 and the costs of this action.

BROWN & KLINE,
Attorneys for Defendants.

Indorsed on back. No. 4159. Collins & Bretch vs. R. L. Walker et al. Answer. Filed May 8th, 1890. W. J. Puett, Clerk District Court.

7 In the District Court of Harvey County, Kansas.

Reply.

E. COLLINS and W. H. BRETCH (Partners as Collins & Bretch), Plaintiffs,

No. 4159. *vs.*

R. L. WALKER, CHARLES HOWARD, JAMES MCMURRAY AND A. J. PARTRIDGE, Defendants.

Come now the plaintiffs, and for their reply to the answer of the defendants herein filed, deny each and every allegation, matter and thing therein set up and contained, except only such allegations thereof as expressly admit the allegations of plaintiffs' petition herein filed.

Whereupon plaintiffs pray for judgment against the defendant and each of them, as asked for in their petition herein filed.

BOWMAN & BUCHER.
Attorneys for Plaintiffs.

Indorsed on back. #4159. Collins & Bretch vs. R. L. Walker et al. Filed at 5 o'clock P. M., May 10, 1890. W. J. Puett, Clerk District Court. By G. W. Puett, Deputy Clerk.

In the District Court of Harvey County, Kansas.

Petition for Removal.

E. COLLINS AND W. H. BRETCH (Parters as Collins & Bretch), Plaintiffs,

vs.

R. L. WALKER, CHARLES HOWARD, JAMES MCMURRAY AND A. J. PARTRIDGE, Defendants.

To the District Court of Harvey County, Kansas:

Your petitioners, R. L. Walker, Charles Howard, James McMurray and A. J. Partridge, the defendants above named, would most respectfully represent to this Honorable Court and show the following facts, to wit:

That the matter and amount in controversy and dispute in the above-entitled action exceeds, exclusive of interest and costs, the sum and value of $2000. That there are controversies in said suit between the plaintiffs, E. Collins and W. H. Bretch, partners as Collins & Bretch, on the one side, and your

petitioners, the defendants, on the other, and that said controversies involve, exclusive of interest and costs, the amount and value aforesaid. That your petitioners are the defendants in the above-entitled action.

That your petitioner, R. L. Walker, was at the time of the grievances complained of by the plaintiffs, the duly appointed, qualified and acting marshal of the United States for the District of Kansas, and ever since that time has been and now is still said marshal. That at all of said times said petitioners, Charles Howard, James McMurray and A. J. Partridge were the duly appointed, qualified and acting Deputy United States Marshals for the District of Kansas. That the above action and the defense thereto arises under the laws of the United States. That this application is made and filed before the expiration of the time required by the laws of the State of Kansas, for the defendants to answer or plead to the plaintiffs' complaint. That the defendants present herewith their bond with sureties and conditioned as required by law for a removal of this case to the Circuit Court of the United States for the District of Kansas. That said action is an action of a civil nature at common law.

Wherefore, your petitioners pray that your Honorable Court proceed no further with this case, but make an order that it be removed into the Circuit Court of the United States for the District of Kansas.

BROWN & KLINE,
Attorneys for said Petitioners.

Indorsed on back. #4159. Collins & Bretch vs. R. L. Walker et al. Petition for removal. Filed at 8:30 o'clock P. M., May 10, 1890. W. J. Puett, Clerk District Court. By G. W. Puett, Deputy Clerk.

8 In the District Court of Harvey County, Kansas.

Bond for Removal.

E. COLLINS AND W. H. BRETCH (Partners as Collins & Bretch), Plaintiffs,

vs.

R. L. WALKER, JAMES MCMURRAY, CHARLES HOWARD AND A. J. PARTRIDGE, Defendants.

Whereas, the above-named defendants have petitioned the above-named Court for a removal of this cause to the United State Circuit Court for the District of Kansas; now, therefore, we, the undersigned, bind ourselves to the above-named plaintiffs, E. Collins and W. H. Bretch, partners as Collins & Bretch, in the sum of five hundred dollars, to the effect that the said

defendants will enter in such Circuit Court on the first day of its next session a copy of the record in such case, and that the said defendants will pay all costs that may be awarded by said Circuit Court if said Circuit Court shall hold that such suit was wrongfully or improperly removed thereto.

R. L. WALKER,
JAMES McMURRAY,
CHARLES HOWARD,
and A. J. PARTRIDGE.

By their attorneys,

BROWN & KLINE,
J. T. AXTELL,
G. W. ROGERS.

STATE OF KANSAS, } ss.
HARVEY COUNTY. }

T. J. Axtell, being duly sworn, says that he is surety on the above undertaking; that he is a resident of Harvey County, Kansas, and is worth the sum of two thousand dollars over and above all exemptions, debts and liabilities.

J. T. AXTELL.

Subscribed and sworn to before me, this 10th day
[SEAL] of May, A. D. 1890.

W. G. PEARSON,
Notary Public.

Term expires Sept. 4th, 1890.

The above bonds and the sureties thereto ap-
[SEAL] proved by me this 10th day of May, A. D. 1890.

W. J. PUETT,
Clerk Dist. Court.

By G. W. PUETT.
Deputy Clerk.

Indorsed on back. 4159. Collins & Bretch vs. R. L. Walker et al. Bond for removal. Filed at 8:30 P. M., May 10th, 1890. W. J. Puett, Clerk District Court. By G. W. Puett, Deputy Clerk.

In the District Court of Harvey County, Kansas.

COLLINS & BRETCH, Plaintiffs,
vs.
R. L. WALKER ET AL, Defendants.

To Brown & Kline, Attorneys for Defendants:

You are hereby notified and informed that at some time to-day in the afternoon the plaintiffs will make application

to the Court for a reconsideration of the Court's order and ruling on the petition and bond for removal in the above-entitled cause. This notice is given you so that if you may desire to be present and heard in the matter, you can do so.

BOWMAN & BUCHER,
Attorneys for Plaintiffs.

Dated May 28th, A. D. 1890.

9 We hereby acknowledge service this 28th day of May, 1890.

BROWN & KLINE.

Indorsed on back. 4159. Collins & Bretch vs. R. L. Walker et al. Notice. Filed May 29, 1890. W. J. Puett, Clerk District Court.

In the District Court of Harvey County, Kansas.

E. COLLINS AND W. H. BRETCH (Partners as Collins & Bretch), Plaintiffs,
No. 4159. *vs.*
R. L. WALKER, CHARLES HOWARD, JAMES MCMURRAY AND A. J. PARTRIDGE, Defendants.

And now on this 28th day of May, 1890, this cause came on for further hearing upon the petition and bond for removal heretofore filed herein by the defendants for a removal of this cause to the Circuit Court of the United States for the District of Kansas; and the plaintiffs, present by their attorneys, Bowman & Bucher, and the defendants, present by their attorneys, Brown & Kline; and upon a further hearing and consideration, the order heretofore made by the Court overruling the said application and petition for removal is hereby rescinded, vacated and set aside, and said application and petition for removal is hereby allowed by the Court, the plaintiffs interposing no objection thereto.

THE STATE OF KANSAS,
NINTH JUDICIAL DISTRICT, } ss.
HARVEY COUNTY.

I, W. J. Puett, Clerk of the District Court of the Ninth Judicial District of the State of Kansas, sitting within and for the county aforesaid, do hereby certify the above and foregoing to be a true, full and complete copy of the record in the therein-entitled cause, as the same remains on file in my office.

[SEAL] Witness my hand and the seal of said court, affixed at my office in Newton, this the 31st day of May, A. D. 1890.

W. J. PUETT, *Clerk.*

Indorsed. No. 6510. Circuit Court, District of Kansas. E. Collins and W. H. Bretch, partners as Collins & Bretch, plaintiffs, vs. R. L. Walker et al., defendants. Transcript. Filed June 2d, 1890. Geo. F. Sharitt, Clerk. Bowman & Bucher for plffs. Brown & Kline for defts. Filed June 2, 1890. Geo. F. Sharitt, Clerk.

In the Circuit Court of the United States, for the District of Kansas.

Motion to Remand.

E. COLLINS AND W. H. BRETCH (Partners as Collins & Bretch), Plaintiffs,

No. 4159. *vs.*

R. L. WALKER ET AL., Defendants.

Come now the plaintiffs in the above-entitled cause and move this Court to remand this cause to the District Court of Harvey County, Kansas, the court in which it was commenced and from which it was removed to this court, for the reason that the record and petition for removal show no sufficient ground for such removal, and such record and petition does not set up and show sufficient facts and allegations to give this court jurisdiction thereof by removal.

BOWMAN & BUCHER,
Attorneys for Plaintiffs.

Indorsed. No. 6510. Collins & Bretch vs. R. L. Walker et al. Motion to remand. Filed June 4, 1890. Geo. F. Sharitt, Clerk.

In the Circuit Court of the United States, for the District of Kansas.

E. H. VAN INGEN & Co., Plaintiffs,

No. 6483. *vs.*

H. CANNON, Defendant.

COLLINS & BRETCH, Plaintiffs,

No. 6510. *vs.*

R. L. WALKER ET AL., Defendants.

It is agreed that the above cause, No. 6483, shall not be called up on Dec. 5th, 1890, but the issue of law therein or that may arise therein may be called up at some other time on notice to either party, except that if the demurrer of defendant at present on file is to be contested it shall be heard before Judge Caldwell and the trial of the case on its merits continued

to next term. The other case, No. 6510, is continued generally until next term, unless remanded.

Dated Newton, Kans., Dec. 1, 1890.

BROWN & KLINE,
BOWMAN & BUCHER,
For Collins & Bretch.

Indorsed. Nos. 6483, 6510. Stipulation. Filed Dec. 3, 1890. Geo. F. Sharitt, Clerk.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF KANSAS. }

At a term of the Circuit Court of the United States of America, for the District of Kansas, begun and held at the City of Topeka, in said district, on Monday, the 24th day of November, 1890, proceedings were had and appear of record in words and figures following, to wit:

WEDNESDAY, December, 3d, 1890.

COLLINS & BRETCH, Plaintiff-,
6510. *vs.*
R. L. WALKER ET AL., Defendants.

It is ordered by the Court that this case be and is hereby continued by stipulation.

11 No. 6510.

In the Circuit Court of the United States for the District of Kansas.

Stipulation and Agreement.

E. COLLINS AND W. H. BRETCH (Partners as Collins & Bretch), Plaintiffs,
vs.
R. L. WALKER, CHARLES HOWARD, JAMES MCMURRAY AND A. J. PARTRIDGE, Defendants.

It is hereby stipulated and agreed by and between the parties and their attorneys of record in the above-entitled action that said cause shall be continued to the November, A. D. 1892, term of said court for trial.

Dated this 20th day of September, 1892.

BOWMAN & BUCHER,
Attorneys for Plaintiffs.
BROWN & KLINE,
Attorneys for Defendants.

Indorsed. No. 6510. E. Collins et al. vs. R. L. Walker et al. Stipulation for Continuance. Filed Sept. 27, 1892. Geo. F. Sharitt, Clerk.

12 UNITED STATES OF AMERICA, } ss.
DISTRICT OF KANSAS. }

At a term of the Circuit Court of the United States of America, for the District of Kansas, begun and held at the City of Topeka, in said district, on Monday, the 28th day of November, 1892, proceedings were had and appear of record in words and figures following, to wit:

WEDNESDAY, November 30th, 1892.

COLLINS & BRETCH
6510. *vs.*
R. L. WALKER ET AL.

Now come the plaintiffs herein, by Bowman & Bucher, their attorneys, and the defendants, by Brown & Kline, their attorneys, and also come a jury, to wit, C. T. Manchester, Samuel Jones, George Grindrod, Levi Wilhelm, W. D. Embly, James McFadden, Joel Simmons, B. F. Martin, I. S. Hallam, Augustus Hauke, William Idleman, L. D. Nichols, twelve good and lawful men of the body of the District of Kansas, who, being duly impaneled and sworn to well and truly try the matters submitted to them in this action, and a true verdict give according to the law and evidence, and thereupon the trial of this case is proceeded with, and not being concluded at the time of adjournment, the jurors are admonished by the Court as to their duties herein, and the further hearing postponed until to-morrow.

13 In the Circuit Court of the United States for the District of Kansas.

Verdict.

COLLINS & BRETCH, Plaintiff-,
Case No. 6510. *vs.*
R. L. WALKER ET AL., Defendant-.

We, the jury in the above-entitled case, duly impaneled and sworn, upon our oaths, find for the plaintiffs, and assess their damages at $3384.39 (thirty-three hundred and eighty-four & 39/100 dollars.)

L. D. NICHOLS, *Foreman.*

Indorsed. No. 6510. Collins & Bretch vs. R. L. Walker et al. Verdict. Filed Dec. 1, 1892. Geo. F. Sharitt, Clerk.

14 UNITED STATES OF AMERICA, } ss.
DISTRICT OF KANSAS. }

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the City of Topeka, in said District on Monday the 28th day of November, 1892, proceedings wer- had and appear of record, in words and figures following, to wit:

THURSDAY, Dec. 1st, 1892.

COLLINS & BRETCH,
6510. *vs.*
R. L. WALKER ET AL.

Now comes the parties herein same as on yesterday, and the jurors impaneled herein being called and all being present, the trial of this cause is proceeded with and the jury having heard the evidence, arguments of counsel and instructions of the Court, retire under the charge of a sworn bailiff for deliberation and afterwards return into open court under the charge of said sworn bailiff, and render their verdict herein which is in the words and figures following, to wit: "In the Circuit Court of the United States for the District of Kansas. Collins & Bretch, plaintiff-, vs. R. L. Walker et al., defendants, case No. 6510. We, the jury in the above-entitled case duly impaneled and sworn, upon our oaths find for the plaintiffs and assess their damages at ($3384.39) thirty-three hundred and eighty-four & 39/100 dollars. L. D. Nichols, foreman."

15 In the Circuit Court of the United States, for the District of Kansas. First Division.

Motion for New Trial.

E. COLLINS & W. H. BRETCH, Partners as Collins & Bretch,
Plaintiffs,
vs.
R. L. WALKER ET AL., Defendants.

Comes now the defendants and move and request the Court to set aside the verdict rendered in the above-entitled action and grant the defendants a new trial for the following reasons, to wit:

FIRST.

Irregularity in the proceedings of the Court and jury, and abuse of discretion, by which defendants were prevented from having a fair trial.

SECOND.

Misconduct of the jury, of the plaintiffs and their attorneys.

THIRD.

Accident and surprise which ordinary prudence could not have guarded against.

FOURTH.

Excessive damages appearing to have been given under the influence of passion and prejudice.

FIFTH.

Error in the assessment of the amount of recovery, the same being too large.

SIXTH.

The verdict is not sustained by sufficient evidence and is contrary to law.

SEVENTH.

Newly discovered evidence material for the defendants which they could not with reasonable dilligence have dis-
16 covered and produced at the trial.

EIGHTH.

Error of law occurring at the trial, and excepted to by defendants.

BROWN & KLINE,
Attorneys for Defendants.

Indorsed. #6510. Collins & Bretch vs. R. L. Walker et al. Motion for New Trial. Filed Dec. 1, 1892. Geo. F. Sharitt, Clerk.

17 UNITED STATES OF AMERICA, } ss.
DISTRICT OF KANSAS. }

At a term of the Circuit Court of the United States of America, for the District of Kansas, begun and held at the City of Topeka, in said district, on Monday, the 28th day of November, 1892, proceedings were had and appear of record in words and figures following, to wit:

FRIDAY, December 2, 1892.

COLLINS & BRETCH
6510. *vs.*
R. L. WALKER ET AL.

The motion to set aside the verdict and for a new trial herein, came on to be heard, on consideration whereof the Court overrules said motion, to which ruling of the Court the defendants now here except. It is further ordered by the Court that the

defendants have forty (40) days from this date to prepare and present bill of exceptions. It is therefore considered, ordered and adjudged by the Court, that the plaintiffs, E. Collins and W. H. Bretch, partners as Collins & Bretch, do have and recover of and from the defendants, R. L. Walker, Charles Howard, James McMurray and A. J. Partridge, the sum of $3384.39, and also their costs herein expended, and that execution issue therefor.

18 In the Circuit Court of the United States for the First Division of the District of Kansas.

Bill of Exceptions.

E. COLLINS AND W. H. BRETCH (Partners as Collins & Bretch), Plaintiffs,
No. 6510. *vs.*
R. L. WALKER, JAMES MCMURRAY, CHARLES HOWARD and A. J. PARTRIDGE, Defendants.

Be it remembered that in the above-entitled cause, on the trial thereof in said court at the November, A. D. 1892, term, held in the Federal Building in the City of Topeka, First Division of the District of Kansas, the following proceedings were had, to wit:

While the jury were being impaneled, Albert Brown testified upon his *voir dire* as a juror; that he was on the regular panel of this term, and that he had served on a jury at the September, 1892, term of the Circuit Court of Shawnee County, Kansas, on the regular panel for that term of said court; whereupon the defendants challenged the said juror on the ground of such prior service; which challenge the Court overruled and the defendants duly excepted at the time.

D. A. HOOK testified on his *voir dire* that he was one of the regular panel for this term of this court and that he had served on the regular panel in the District Court of Leavenworth County, Kansas, within the past two years. On account of such prior service he was challenged by the defendants; which challenge the Court overruled, to which ruling the defendants duly excepted at the time.

M. I. LEE, upon his *voir dire* testified that he was one of the regular panel for this term of this court, and that he had served upon the regular panel as a juror in the District Court of Shawnee County, Kansas, during the January, 1892, term of said District Court.

19 For reason of such prior service he was challenged by the defendants for cause; which challenge the Court overruled, and to which ruling the defendants duly excepted at the time.

JOEL SIMMONS testified on his *voir dire* that he was one of the regular panel of jurors for this term of court, and that he had served on the regular panel as a juror in the District Court of Ellis County, Kansas, within the last eighteen months. On account of such prior service he was challenged for cause by the defendants; which challenge the Court overruled, and to which ruling the defendants duly excepted at the time.

A. G. COGSWELL testified upon his *voir dire* that he was one of the regular panel for this term of this court, and that he had served on the regular panel as a grand juror in the United States District Court for the District of Kansas, at Topeka, at the Spring term, 1892, for which prior service and on account thereof he was challenged for cause by the defendants; which challenge the Court overruled and to which ruling the defendants duly excepted at the time.

GEORGE GRINDROD testified upon his *voir dire* that he was one of the regular panel of jurors for this term, and that he had served upon the regular panel of jurors in the District Court of Wyandotte County, Kansas, during the September, 1892, term of that court. For which prior service and on account thereof he was challenged for cause by the defendants; which challenge the Court overruled, and to which ruling the defendants duly excepted at the time.

The jurors D. A. Hook, M. I. Lee and A. G. Cogswell were excused on peremptory challenges by the plaintiffs and did not serve on the jury.

20 The jurors Albert Brown, Michael Heery and A. H. Scott were excused on peremptory challenges by the defendants and did not serve upon the jury.

The said jurors Joel Simmons and George Grindrod were not excused, but served upon the jury. Each party exhausted all their peremptory challenges.

In overruling the challenges for cause above mentioned, the Court found as a matter of fact that each of said jurors had served upon prior juries, as he testified, but concluded that such prior service was not good ground for challenge, and upon this ground the rulings complained of above were made.

"To support the issues on their part the plaintiffs, among other evidence, offered the deposition of E. Collins; that the defendants objected to the reading of the same solely on the

ground that it had not been filed one day before the day of trial—all other objections thereto having been expressly waived by defendants. This objection was orally made by counsel, and no exceptions to said deposition was made in writing by defendants and filed in the cause before the commencement of the trial. This deposition was filed November 29, 1892, and the trial was commenced November 30, 1892. The Court overruled the objection, to which ruling the defendants duly excepted at the time. The said deposition was then read in evidence to the jury."

W. H. BRETCH, called as a witness on his own behalf, testified that he was one of the plaintiffs in this case; testified that he knew what goods the marshal and his deputies had taken from the store of the plaintiffs in Newton, Kansas, and that he had been in the business of farming and the grocery business, in the boot and shoe business, in the real estate business, but that he had never been in the gents' furnishing goods business or tailoring or piece goods business, before purchasing the stock of goods involved in this case from
21 Henry Cannon; that prior to such purchase he had had but three days' experience in selling such goods, and that was on the very stock of goods which the mashall levied upon and carried away; that he had sold quite a number of pieces of such goods during the said three days, and that he had sold some few pieces of the piece goods after the marshal had levied on the goods in question and carried them away; that this constituted all of his experience in said business, except that he sold all the gents' furnishing goods remaining after defendants had made the levy, and has since been and then was engaged in the selling of *of* gents' furnishing goods, and helped take an invoice of the Cannon stock of goods prior to the purchase of them and immediately after defendants carried off the goods in question, and that he knew the market value of such goods at that time. The counsel for the plaintiff then asked the witness what, in his judgment, was the market value of the goods at the time he took them, which the marshal had carried away. Counsel for defendants objected to this on the ground that the witness was not qualified to state. The Court overruled the objection, to which ruling the defendants duly excepted at the time. The witness then answered that the goods were worth from $3000 to $3200. The witness in rebuttal also testified that he had bought the stock of goods involved in this case from Henry Cannon; that the goods invoiced something over $12,000, based on Cannon's markings; that Cannon had the goods marked from 15 to 20 per cent above cost and carriage; that they invoiced them after night so as to not make it necessary to close the store or interfere with the business during business hours; that he had bought the goods at fifty cents on

the dollar upon the basis mentioned above; that he paid for them (he and his partner) $6000, for which he gave a check to the said Cannon on the Newton National Bank for $6000; that the trade was worked up partly and mostly by C. R. McLain, cashier of the Newton National Bank; that he knew or
22 believed that Cannon owed the bank; that he did not know of any other creditors; that he did not ask Cannon about any other creditors; that the check was put into the hands of the cashier of said bank to be by him held until the goods were invoiced; that after the invoice the check was upon order of plaintiffs turned over to Cannon, in payment for said stock; that he had bought a stock of boots and shoes, together with his partner, of the said Newton National Bank a short time prior to this, under chattel mortgage, and closed it out; that he did not ask about whether there was any creditors who had claims against the Cannon stock or not, except the Newton National Bank, and he had never been in this business before, that is, the business of gents' furnishing goods and piece goods for suitings. He had ascertained shortly after the Van Ingen suit was commenced, which was after he bought these goods, that Cannon was in debt over $12,000; that if the goods invoiced over $12,000 they were to pay fifty cents on the dollar for the additional invoice; and if they invoiced less than $12,000 Cannon was to pay them back at the same rate.

The witness Bretch also testified that the sheriff of Harvey County, Kansas, levied attachments upon the balance of the goods left after the marshal had taken away what he levied on, and that the plaintiffs in this action, to wit, Collins and Bretch had replevied said goods from the sheriff which the sheriff levied upon.

Edward N. Pigot testified in a sworn deposition on behalf of the defendants that he lived in New York City; that he was a wholesale merchant dealing in woolen goods, and was a member of the firm of Norris, Leonard & Pigot, of New York City; that Henry Cannon owed Norris, Leonard & Pigot $1287.67; that said amount was due for merchandise sold by the said firm to said Henry Cannon at his instance
23 and request; that about the first of February, 1890, said firm received from Henry Cannon a statement of his financial condition; said original statement was attached to his deposition and read to the jury, and is in the words and figures following, to wit:

"H. Cannon. Merchant Tailor.

Gents' Furnishing Goods, Hats and Caps.

Newton, Kansas.

Stock taken January 25, 1890.

Stock on hand	$ 8,836 23
Fixtures	500 00
Book accounts, good	1,595 00
Total	10,931 23
Liabilities	1,640 00
	9,291 23

(Signed) H. CANNON."

That on account of such statement the said firm of Norris, Leonard & Pigot had sold goods since receiving the same, between February 18th and March 6th, 1890, to said Cannon to the amount of $914.36. The said last-mentioned amount was part of the indebtedness above mentioned. That they would not have sold said goods except on the strength of said statement, and that they believed the same to be true.

JOHN D. FARON, in his sworn deposition on behalf of the defendants, testified that he lived in New York City and was in the employ of E. H. Van Ingen & Co.; that Henry Cannon was indebted to them in the sum of $2415.68 and interest; that they received about January 27th or February first a statement in writing of Henry Cannon, Newton, Kansas, and that the original of said statement, attached to his deposition, was read to the jury, and is in words and figures the same as given above in the deposition in the testimony of Edward N. Pigot;
24 that of the amount above mentioned as the indebtedness of the said Henry Cannon to the said house of E. H. Van Ingen & Co., $1574.68 thereof was incurred since January 27, 1890, and between that date and March 7, 1890, and was for goods sold to the said Henry Cannon at his special instance and request, after receiving the above-mentioned statement concerning his financial condition, and the said goods would not have been sold except on account of such statement, and that the said firm of E. H. Van Ingen & Co. believed the statement therein to be true and correct; that all of said indebtedness was for goods, wares and merchandise sold by the said Henry Cannon at his instance and request, and was still due, with interest, above all set-offs and claims.

It was admitted by plaintiffs that the defendant, R. L. Walker, was, and had been for more than three years, the duly

appointed, qualified and acting U. S. Marshal for the District of Kansas, and that the other defendants were and had been for more than three years last past, the duly appointed, acting and qualified deputy marshals of the United States for the District of Kansas.

HENRY CANNON, being duly sworn, testified for defendants that he owed the firm of E. H. Van Ingen & Co. $2567.62, with interest and costs on the judgment rendered against him in the case of E. H. Van Ingen & Co. against H. Cannon in the Circuit Court of the United States for the First Division of the District of Kansas; that he was the defendant in that case; he also testified that at the time that he made and sent the statement concerning his financial condition to Norris, Leonard & Pigot and E. H. Van Ingen & Co. testified to by the witness Edward N. Pigot and John D. Faron, a copy of which is given above, he was indebted to the Newton National Bank, and had been long prior thereto, in the sum of $2000, and that he was indebted to various other parties, amounting in all, including the indebted-
25 ness to said bank, to the sum of $5000; he also testified that at the time he sold his stock of goods to Collins & Bretch, the plaintiffs, he owed over $12,000; that he paid $500 of cash that he got of plaintiffs for said goods, to his attorneys, Ady & Nicholson, for advice; he also testified that the invoice of the goods was taken after the check for $6000 had been handed over by the plaintiffs to the cashier of the Newton National Bank, and that the sale was consummated in the back room of the Newton National Bank; that the invoice was taken after night; that he had purchased between $5000 and $6500 worth of new goods that spring, to wit, the spring of 1890, and placed in his stock in Newton, Kansas; that he could not tell exactly the amount; that of the new 1890 spring goods, except what he had prior thereto retailed out, were sold to Collins & Bretch; that he had preferred creditors other than his N. Y. creditors to the amount of about $4100, out of the moneys he received from the plaintiffs, and intended to prefer the same when he made said sale.

It was admitted to the Court and jury by the plaintiffs on the trial of this case that the attachment proceedings had in the case of E. H. Van Ingen & Co. vs. H. Cannon, mentioned in defendants answer and under which defendants seized the goods in question, including the writ of attachment, were regular and valid and a full justification and protection to defendants, and entitled them to recover as against the plaintiffs in this action, if the sale from Cannon to the plaintiffs of the goods in question was fraudulent, or if Cannon had procured the goods from the attaching creditors by fraud, and the plain-

tiffs were not innocent, *bona fide* purchasers thereof from Cannon for value, or if they had knowledge or any notice of such fraud; and it was admitted and conceded by plaintiffs on the trial that if Cannon was guilty of any fraud, either in
26 the purchase, or in the sale of these goods to plaintiffs, and plaintiffs had knowledge or any notice of such fraud, then plaintiffs could not recover as against defendants in this action.

Plaintiffs also admitted that judgment had been rendered against Cannon in said case of E. H. Van Ingen & Co. vs. H. Cannon for $2400.00, and that such judgment remained unpaid.

Counsel for defendants had marked as Exhibit 4 what he claimed to be a copy of an affidavit in replevin.

W. E. Brown, being then duly sworn, testified for defendants, that he was counsel for the defendants in that case, and had been since the cause was instituted; that he knew what Exhibit 4 was; that it was a true, correct, full and complete copy to his certain knowledge of an affidavit in replevin made and filed in the District Court of Harvey County, Kansas, in the case of Collins and Bretch against E. E. Pollard et al.; that said original affidavit was signed by the plaintiff, E. Collins; that he knew Mr. Collins handwriting and knew that he signed the original and that it, the original, was sworn to before the District Clerk of Harvey County, Kansas; that Mr. Collins, one of the plaintiffs, had stated to witness that he had signed and sworn to said original affidavit; witness also testified that he did not have the original affidavit; that he did not know where it was unless it was on file in the District Court of Harvey County, Kansas, which was more than 100 miles from the place where this case was being tried; that said original affidavit was made and filed in a replevin suit entitled Collins & Bretch vs. E. E. Pollard et al., being the same action in which plaintiffs in this action replevied the balance of the goods after the marshal had levied on and carried away a portion of the Cannon stock, and being the balance of the goods which the
27 sheriff of Harvey County had levied upon.

Charles Bucher testified, after being duly sworn, in regard to said affidavit of replevin as follows:

I am attorney for the plaintiffs in this case; I was attorney for the plaintiffs in the case of Collins & Bretch vs. E. E. Pollard and others in the District Court of Harvey County, Kansas, being a replevin action in which the affidavit of replevin was filed which was spoken of in the testimony of W. E. Brown; I have examined "Exhibit 4" handed me by said

W. E. Brown, counsel for defendant, which "Exhibit 4" is found in the printed record of this case on a former appeal or proceeding in error in the Circuit Court of Appeals; I do not know for sure that this "Exhibit 4" is a copy of said replevin affidavit; I don't recollect that I ever compared it, though I was attorney in the case in the Circuit Court of Appeals; I presume that it is a copy of said affidavit; I asked the Clerk of the District Court of Harvey County, Kansas, a few days ago for the papers in said replevin case and he informed me that Brown & Kline had them; I inquired of Mr. Kline and he informed me that he did not have them; I do not know where they are.

I have been the attorneys for the plaintiffs in this case and also in said replevin case ever since the two actions were commenced; the defendants then offered in evidence the said Ex. 4 for the purpose of showing that in the replevin suit against the sheriff, plaintiffs had recovered from the sheriff the goods left by the defendants in the store at Newton; that these goods were worth $6000, the full amount of the purchase price of the whole stock, paid by plaintiffs to Cannon; that therefore, plaintiffs had lost nothing by the defendants taking what they took in this case, and that as against the attaching
28 creditors whom the defendants represented in this case, the plaintiffs could not recover the goods in question in this action, to which plaintiffs objected as incompetent, irrelevant and immaterial, and also because it was not the best evidence; the Court sustained the objection, to which ruling of the Court the defendants at the time duly excepted.

Said Exhibit 4 is in words and figures following, to wit:

"In the District Court of Harvey County, Kansas.

Affidavit in Replevin.

E. COLLINS AND W. H. BRETCH, partners as Collins & Bretch, Plaintiffs,

vs.

E. E. POLLARD AND M. C. GROOM, Defendants.

E. COLLINS, of lawful age, being first duly sworn, says that he is one of the plaintiffs in the above-entitled cause, and that the said plaintiffs are the owners and entitled to the immediate possession of the following described property of the actual value, as follows, to wit: A certain stock of goods, wares and merchandise, consisting of hats, caps, collars, cuffs, shirts, gents' underwear, hosiery, trunks, valises, piece goods, trimmings, neckwear, handkerchiefs, coats, vests, gloves, rubber coats, jackets, overalls, umbrellas, one fire proof safe, show-

cases, counters and shelving, the same being the stock of gents' furnishing goods, merchant tailoring goods, merchandise and counters, shelving, store fixtures and showcases heretofore kept by the said plaintiffs in their store in the lower store room on Main Street, in the City of Newton, Harvey County, Kansas, and numbered 509, and being in the stone and brick building located and situated on lot number 10, in block 38, in said city, which said goods, wares, merchandise and property is now located and being in the said store room and all of the aggregate and actual value of $6000.

29 Affiant further says that neither he nor his partner, W. H. Bretch, is able to give a fuller, more minute or definite description of said goods, wares, merchandise or property; that affiant is unable to give an itemized statement and description of the same, and that he is unable to give or set up herein the value of any of the items or articles of the property so above described, and that he is only able to give the actual value of the aggregate of such property as heretofore stated; that said property is wrongfully detained from the said plaintiffs by the said defendants, E. E. Pollard and N. C. Groom, and that said property was not taken in execution of any order or judgment against said plaintiffs, this affiant and the said W. H. Bretch, or for the payment of any tax, fine or amercement assessed against them, or by virtue of any order of delivery issued in replevin, or any mesne or final process issued against them.

(Signed) E. COLLINS. [SEAL]

Subscribed and sworn to before me, this 29th day
[SEAL] of April, A. D. 1890.

(Signed) W. J. PUETT,
Clerk District Court."

Filed April 29th, 1890. W. J. Puett, Clk.

Mr. Brown also testified that Exhibit 3 was a stipulation of counsel in the case of Collins & Bretch vs. Pollard et al., and that it was signed by the attorneys in that case. Said case is the said replevin case in which Collins & Bretch replevined the balance of the goods levied after the marshal had levied on and carried away those in controversy in this case.

Mr. Brown then offered Exhibit 3 in evidence. Plaintiffs objected; the Court sustained the objection, and the defendants the nand there duly excepted.

Said Exhibit 3 is in words and figures following, to wit:

30 "District Court of Harvey County, Kansas.

Stipulation.

COLLINS & BRETCH, Plaintiffs,
vs.
E. E. POLLARD ET AL., Defendants.

It is stipulated and agreed that this case shall not be appealed, but that the motion for a new trial shall be withdrawn, and that the judgment in this case shall be final.

(Signed) BOWMAN & BUCHER,
Attys. for Plaintiffs.
BROWN & KLINE,
Attys. for Defendants."

W. H. BRETCH, a witness called in his own behalf by the plaintiffs, on rebuttal, testified, among other things, as follows:

Q. Now, you may state, Mr. Bretch, after the marshal took away the goods in question, whether or not you got the balance of the goods back?

A. The balance that the marshal left?

Q. The balance of the stock which you got from Cannon; did you get it back after the marshal took away what he wanted?

A. We got the remainder back.

Q, What do you mean by the remainder; the balance of that stock of goods?

A. Yes, sir.

Q. Now, then, what did you do with that balance?

A. We closed it out.

Q. Closed it out; how?

A. Sold it out at retail.

Q. In the same store?

A. In the same store.

Q. Over what period of time did you retail it out?

Counsel for the defendants objected to the question as incompetent, irrelevant and immaterial. The Court overruled the objection; to which action and ruling of the Court
31 the defendant at the time duly excepted and still excepts.

A. It took us about eight months.

Q. You may state to the jury, if you know or recollect now, what you realized out of that balance of that stock at retail as you have stated, over and above the necessary expenses of selling it out?

Counsel for the defendants objected to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the defendants at the time duly excepted and still except.

A. You mean after paying all expenses?
Q. I do, sir; I put that in my question; I want to know what you realized out of that stock over and above all expenses of selling it?

Counsel for the defendants objected to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the defendants at the time excepted and still except.

A. About fifty-seven or fifty-eight hundred dollars.
Q. Over and above expenses?
A. Well, that is not counting anything for our time, and then there was a part of the goods—

By Mr. Brown. Wait a moment. We objection to the last question as incompetent, irrelevant and immaterial, and leading. The Court overruled the objection, to which action and ruling of the Court the defendants at the time duly excepted and still excepts.

A. Then there was a part of these goods that we sold out at a profit that we put into new goods and sold them also, and made a profit also on a part of the old goods.
Q. I expect you did make a profit; you was trying to make a profit on all of them, were you not?

Counsel for the defendants objects to the question as
32 incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the defendants at the time duly excepted and still excepts.

A. What I mean by a profit is that we got more for them over and above what we paid for them.
Q. That is what I mean by profit; now, you may state whether or not you made an effort to get just as much for these goods in selling them out as you could?

Counsel for the defendants objected to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the defendants at the time duly excepted and still duly except.

A. Yes, sir.
Q. Now, sir, do you know about what you realized out of the goods that you bought from Cannon, not taking into calcu-

lation the new goods that you put in there; do you know about what you realized out of the goods that you bought from Cannon, which were left by the marshal, by retail, over and above all necessary expenses of selling them?

Counsel for the defendants objected to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the defendants at the time duly excepted and still except.

A. Well, I couldn't tell you exactly, but I think I can make a pretty close estimate on them.
Q. Well, make as close estimate as you can.

Counsel for the defendants objected to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the defendants at the time duly excepted and still duly except.

A. Well, I should think about fifty-three or fifty-four
33 hundred dollars.

Q. Now, what do you include in necessary expenses in arriving at that conclusion?

Counsel for the defendants objected to the question as incompetent, irrelevant and immaterial. The Court overruled the objection; to which action and ruling of the Court the defendants at the time duly excepted and still except.

A. Well, that includes rent, light, heat and insurance.
Q. Did you pay any taxes of any kind?

Counsel for the defendants objected to the question as incompetent, irrelevant and immaterial. The Court overruled the objection; to which action and ruling of the Court the defendants at the time duly excepted and still except.

A. Yes, sir.
Q. In making the estimate which you have just made do you make any allowance for your own time and your partner's time?

Counsel for the defendants objected to the question as incompetent, irrelevant and immaterial. The Court overruled the objection; to which action and ruling of the Court the defendants at the time duly excepted and still except.

A. No, sir.
Q. You may state to the jury what you and your partners were doing during the time—during the eight months that you were retailing out this stock of goods?

Counsel for the defendants objected to the question as incompetent, irrelevant and immaterial. The Court overruled the objection; to which action and ruling of the Court the defendants at the time duly excepted and still excepts.

A. We were selling out the goods; nothing else.

Q. State whether or not you devoted all your time, both of you, during that time to that business?

34 Counsel for the defendants objected to the question as incompetent, irrelevant and immaterial. The Court overruled the objection; to which action and ruling of the Court the defendants at the time duly excepted and still except.

A. Didn't do anything else; no, sir.

Q. Do you know what your services and your partner's services, during the time you were selling that stock of goods out, were fairly and reasonably worth?

Counsel for the defendants objected to the question as incompetent, irrelevant and immaterial. The Court overruled the objection; to which action and ruling of the Court the defendants at the time duly excepted and still except.

A. Yes, sir.

Q. You may state to the jury what your services were fairly and reasonably worth at that time, and the services of your partner?

Counsel for the defendants objected to the question as incompetent, irrelevant and immaterial, and for the further reason that it had not been shown that the witness is competent and qualified to answer the question. The Court overruled the objection; to which action and ruling of the Court the defendants at the time duly excepted and still except.

A. To take charge of a stock of that kind and close it out was worth one hundred dollars a month each.

Q. If I understand you rightly, now, there seems to have been a misunderstanding here when you made your estimate of what you realized out of these goods. You said you realized fifty-three hundred dollars over and above all expenses. You did not, in making that calculation, calculate the value of any of your time or of your partner's time, did you?

Counsel for the defendants objected to the question as incompetent, irrelevant and immaterial and leading. The Court overruled the objection; to which action and ruling of
35 the Court the defendants at the time duly excepted and still except.

A. No, sir.

The defendants at the close of the evidence and before the Court had instructed the jury, requested the Court to give each of the following instructions to the jury, and made a separate request as to each instruction given below and which instructions so requested are in words and figures following, to wit:

In the Circuit Court of the United States for the First Division of the District of Kansas.

COLLINS & BRETCH, Plaintiffs,
vs.
R. L. WALKER ET AL., Defendants.

Come now, the defendants and request and move the Court to give the following special instructions, separately, to the jury and to give each separately, to wit:

First. The jury are instructed that if H. Cannon obtained the goods in question, or any part of them, by means of fraudulent statements as to his financial standing, and then sold said goods, such sale would in law be a disposition of goods with the intent to defraud creditors.

Refused ex. by defts.

Second. The jury are instructed that if Cannon bought the goods, or any part of them, which he sold to Collins & Bretch on the strength of false statements regarding his financial standing and credits was extended to him by reason of such false statements, then a sale of such goods with an intent to use the money obtained from such sale for any other purpose than to pay for such goods, obtained by reason of false statement would be a fraud of creditors.

Refused, ex. by defts.

36 Third. If Cannon bought the goods in question, or any part of them, on the strength of false and fraudulent statements, and then sold and disposed of the same, and then used the money received for the same to pay debts other than those incurred in the purchase of the goods, then such sale would be, in law, fraudulent, and the law would imply that it was made for the purpose of defrauding creditors.

Refused, ex. by defts.

Fourth. If Cannon, by reason of false statements as to his financial standing, obtained the goods in question, or any part of them, and then sold them for a sum less than sufficient to pay the debt incurred, on the strength of such false statements, and knew at the time or had reason to believe that he would not have money enough to pay for such goods obtained by false statements, then such sale would be fraud of creditors and

such creditors would have the right of possession of such goods, unless they had passed into the hands of *bona fide* purchasers for value without notice.

Refused, ex. by defts.

Fifth. The jury are instructed that if Cannon obtained the goods in question by false and fraudulent statements as to his financial standing, and then sold the goods to Collins & Bretch, with the intent to prefer other certain creditors to such an extent as to leave an amount of money in his hands insufficient to pay the debts which were incurred on the strength of such false and fraudulent statements, in full, then such sale would be in fraud of creditors and would be made with the intent to defraud creditors within the meaning of the law.

Refused, ex. by defts.

Sixth. The jury are instructed that if H. Cannon bought the goods in question, by means of false and fraudulent
37 statements and never paid for the same, and procured credit by means of false and fraudulent statements as to his financial condition, and then sold such goods to Collins & Bretch, with the intention not to pay for such goods so obtained by reason of false and fraudulent statements, such sale would in law be in fraud of creditors: and if you find that a portion of such goods were attached in a suit in the District Court of Harvey County, Kansas, and replevied by Collins & Bretch and recovered in such replevin case, and if you further find that the value of the goods replevied in such suit in the District Court of Harvey County, Kansas, was $6000.00, and if you find that the amount paid for the whole stock of goods by Collins & Bretch was $6000.00 then in such case your verdict should be for the defendants in this case.

Seventh. The jury are further instructed that if H. Cannon bought the goods in question, or any portion of the same, by reason of false and fraudulent statements as to his financial standing, and then sold the same to Collins & Bretch, and that a portion of such goods were attached by parties which Cannon owed, and such goods replevied by Collins & Bretch, and Collins & Bretch in such replevin case recovered a portion of such goods, then your verdict should be only for the difference in the value of the goods so recovered in such replevin case, and the amount actually paid for the whole stock of goods by Collins & Bretch, and if you find that Collins & Bretch have recovered an amount of goods equal to the amount actually paid for the whole stock, then your verdict in this case should be for the defendants.

Eighth. If Cannon sold goods to Collins & Bretch which were purchased on false statements, with the intent to prefer creditors other than those from whom he purchased the goods on false statements, then such sale would be in law considered made for the purpose of defrauding creditors.

38 Refused and excepted to by defendants.

Ninth. Where the goods or any part of them, which were sold by Cannon to the plaintiffs were gotten of the house of E. H. VanIngen and Company, or other wholesale houses, by fraudulent statements, that in that case the burden of proof is upon the plaintiffs to show that they acted in good faith as innocent purchasers for value in the purchase of said goods from Cannon which were gotten by fraud.

Refused and excepted to by defts.

Tenth. The attachment affidavit, writ, return, and other papers and the judgment in the case of E. H. Van Ingen & Co. vs. Henry Cannon and introduced in evidence are legal and regular in form, and are sufficient to protect the marshal and justify him in levying on the goods in controversy, providing you find that Collins & Bretch had knowledge of fraudulent intent on the part of Cannon, or that they had sufficient notice to put a reasonable man upon inquiry in regard to such intention of Cannon to defraud his creditors.

Refused and excepted to by defendants.

The Court refused to give each of the above instructions separately, and separately refused to give each and every one of the same separately, to which ruling of the Court at the time the defendants duly excepted and duly excepted to the refusal of the Court separately to give each and every of the said instructions asked by defendants.

And thereupon, at the conclusion of the evidence, the Court orally instructed the jury as to the law of the cause, as follows, to wit:

Gentlemen of the Jury:

First. It is claimed by the plaintiffs in this case that on the 18th day of April, 1890, they were the owners and in the rightful possession of a certain stock of goods, wares
39 and merchandise in the City of Newton in this State. It is further alleged that upon that day the defendants, the United States Marshal and his deputies, wrongfully and without any right or authority so to do, entered the plaintiff's store at Newton, Kansas, where the goods and property were

then kept by them, and that they took forcible possession of the property sued for in this action, and it is the value of that property which is sued for in this action. It is further alleged that the defendants then and there unlawfully deprived the plaintiffs of this property, and that they wrongfully and unlawfully converted and disposed of a portion of the goods to their own use and benefit, *i.e.*, to the use of the defendants, whereby the plaintiffs claim they have been greatly damaged. The plaintiffs also claim to be the owners of the property by virtue of a sale made to them by Henry Cannon, who was the original owner thereof.

Second. Defendants admit that they took possession of the stock of goods and appropriated and converted a portion thereof to their own use; but they further claim that they took possession of and converted the goods, by virtue of a levy thereon of a certain order of attachment issued out of this court in favor of the firm of E. H. Van Ingen & Company against the goods and chattels of Henry Cannon, the party who sold the goods to these plaintiffs. Defendants further insist in their answer that the alleged sale under which the plaintiffs claim title to the goods was made with the fraudulent purpose, on the part of Cannon, of cheating, hindering and delaying his creditors, and that the plaintiffs either intended by their purchase to aid in accomplishing that result, or at and before their purchase were chargeable in law with notice of the fraud designed by Cannon upon his creditors. This is a brief statement of the claims of the respective parties. You will have the petition of the plaintiff, the answer of the defendants, and the reply of the plaintiffs to that answer in the jury room. They are embodied in the transcript which I will hand you. To the giving of which the defendants duly excepted at the time.

Third. You are the judges of the weight of the evidence and credibility of the witnesses. In the trial of a civil case the burden of proof is upon the plaintiff to establish his cause of action by a fair preponderance of the evidence.

Fourth. Under the law every conveyance of personal property made or obtained with the intent to hinder, delay or defraud creditors of their lawful and just debts is void, and of no effect against such creditors.

Fifth. Parties to a business transaction are not presumed, however, to deal with each other in bad faith, but, on the contrary, are presumed to deal honestly and in good faith until the opposite is shown by the evidence upon the trial, and anyone who alleges that such acts are done in bad faith, or for a

dishonest and fraudulent purpose, takes upon himself the burden of showing that such is the case.

In other words, fraud is never presumed, and it devolves upon him who alleges fraud to show the same by satisfactory proof, *i.e.*, proof to the satisfaction of the jury. To the giving of which defendants duly excepted at the time.

Sixth. Fraud may be shown, however, by circumstances; but the circumstances must be of such a character and so connected with the transaction in question as to lead the mind naturally to infer that the alleged fraud has been perpetrated by the parties to the transaction. To the giving of which defendants duly excepted at the time.

Seventh. You should consider the situation of the parties, and all of the surrounding circumstances; all the actions
41 of both parties and the nature of the transaction of the parties, and from the whole draw what seems to you to be a fair and just inference as to the motives of those concerned in the trade.

Eighth. The inadequacy or insufficiency of the price paid when a sale takes place may be considered by you in determining the good faith of the parties. An inadequate price, however, if you should find that an inadequate price was paid in this case, is not necessarily decisive, but is simply to be viewed as a circumstance, when it exists, of greater or less weight, according as the inadequacy may be great or small. The mere fact that a sale of merchandise was not made in the usual and ordinary course of business will not necessarily invalidate the sale, but you should consider this as a circumstance in determining the good faith of the parties, if you should find that the sale in question was an unusual one or not made in the ordinary manner.

To the giving of which defendants duly excepted at the time.

Ninth. A party who is in debt, if he find himself unable to pay all of his creditors, may lawfully prefer some of his creditors over others; and if a merchant in embarrassed circumstances sells out his stock and apply-s the proceeds to the payment of a part of his creditors to the exclusion of others, he does not thereby commit a fraud on the excluded creditors, if the debts which he pays are honest debts.

To the giving of which defendants duly excepted at the time.

Tenth. In determining whether the sale in question in this case was made in good faith or for the purpose of defeating Cannon's creditors, you should take into account the intentions and motives of both parties to the sale. That is, the pur-

then kept by them, and that they took forcible possession of the property sued for in this action, and it is the value of that property which is sued for in this action. It is further alleged that the defendants then and there unlawfully deprived the plaintiffs of this property, and that they wrongfully and unlawfully converted and disposed of a portion of the goods to their own use and benefit, *i.e.*, to the use of the defendants, whereby the plaintiffs claim they have been greatly damaged. The plaintiffs also claim to be the owners of the property by virtue of a sale made to them by Henry Cannon, who was the original owner thereof.

Second. Defendants admit that they took possession of the stock of goods and appropriated and converted a portion thereof to their own use; but they further claim that they took possession of and converted the goods, by virtue of a levy thereon of a certain order of attachment issued out of this court in favor of the firm of E. H. Van Ingen & Company against the goods and chattels of Henry Cannon, the party who sold the goods to these plaintiffs. Defendants further insist in their answer that the alleged sale under which the plaintiffs claim title to the goods was made with the fraudulent purpose, on the part of Cannon, of cheating, hindering and delaying his creditors, and that the plaintiffs either intended by their purchase to aid in accomplishing that result, or at and before their purchase were chargeable in law with notice of the fraud designed by Cannon upon his creditors. This is a brief statement of the claims of the respective parties. You will have the petition of the plaintiff, the answer of the defendants, and the reply of the plaintiffs to that answer in the jury room. They are embodied in the transcript which I will hand you. To the giving of which the defendants duly excepted at the time.

Third. You are the judges of the weight of the evidence and credibility of the witnesses. In the trial of a civil case the burden of proof is upon the plaintiff to establish his cause of action by a fair preponderance of the evidence.

Fourth. Under the law every conveyance of personal property made or obtained with the intent to hinder, delay or defraud creditors of their lawful and just debts is void, and of no effect against such creditors.

Fifth. Parties to a business transaction are not presumed, however, to deal with each other in bad faith, but, on the contrary, are presumed to deal honestly and in good faith until the opposite is shown by the evidence upon the trial, and anyone who alleges that such acts are done in bad faith, or for a

dishonest and fraudulent purpose, takes upon himself the burden of showing that such is the case.

In other words, fraud is never presumed, and it devolves upon him who alleges fraud to show the same by satisfactory proof, *i.e.*, proof to the satisfaction of the jury. To the giving of which defendants duly excepted at the time.

Sixth. Fraud may be shown, however, by circumstances; but the circumstances must be of such a character and so connected with the transaction in question as to lead the mind naturally to infer that the alleged fraud has been perpetrated by the parties to the transaction. To the giving of which defendants duly excepted at the time.

Seventh. You should consider the situation of the parties, and all of the surrounding circumstances; all the actions
41 of both parties and the nature of the transaction of the parties, and from the whole draw what seems to you to be a fair and just inference as to the motives of those concerned in the trade.

Eighth. The inadequacy or insufficiency of the price paid when a sale takes place may be considered by you in determining the good faith of the parties. An inadequate price, however, if you should find that an inadequate price was paid in this case, is not necessarily decisive, but is simply to be viewed as a circumstance, when it exists, of greater or less weight, according as the inadequacy may be great or small. The mere fact that a sale of merchandise was not made in the usual and ordinary course of business will not necessarily invalidate the sale, but you should consider this as a circumstance in determining the good faith of the parties, if you should find that the sale in question was an unusual one or not made in the ordinary manner.

To the giving of which defendants duly excepted at the time.

Ninth. A party who is in debt, if he find himself unable to pay all of his creditors, may lawfully prefer some of his creditors over others; and if a merchant in embarrassed circumstances sells out his stock and apply-s the proceeds to the payment of a part of his creditors to the exclusion of others, he does not thereby commit a fraud on the excluded creditors, if the debts which he pays are honest debts.

To the giving of which defendants duly excepted at the time.

Tenth. In determining whether the sale in question in this case was made in good faith or for the purpose of defeating Cannon's creditors, you should take into account the intentions and motives of both parties to the sale. That is, the pur-

poses and intentions of Collins and Bretch and Cannon. If you should be satisfied from the evidence in the case that it has been shown that in making the sale to the plaintiffs Cannon intended to defraud his creditors; yet if, on the
42 other hand, you should find that the plaintiffs had no intention of participating in the fraud, or to aid or assist Cannon in carrying out such fraud, in such case you should find for the plaintiffs. In other words, to render this sale void as to creditors, both seller and buyer must have acted in bad faith, and if the plaintiffs bought from Cannon in good faith, they took a good title, whetever may have been Cannon's intention in effecting the sale.

To the giving of which defendants duly excepted at the time.

Eleventh. If Cannon bought the goods in question, or any of them, upon false statements, or if he bought such goods with the intention of selling them without paying the parties from whom he bought them, that would make the sale fraudulent so far as Cannon is concerned, but, in the absence of any notice of such facts to the plaintiffs, they would not be affected thereby, and the sale would not thereby be void as to them.

Twelfth. Actual knowledge by the plaintiffs of the fraudulent purpose of Cannon was not necessary in order to vitiate the sale. The knowledge of facts sufficient to excite the suspicions of a prudent man and put him upon inquiry is in law equivalent to knowledge of the ultimate fact. If, therefore, you are satisfied from the evidence in this case that the plaintiffs made the purchase in question under such circumstances as to arouse the suspicions of a man of common sagacity, and to put a prudent man upon inquiry as to the purposes of Cannon in making the sale to them, and that instead of making any inquiry they omitted or neglected doing so, then you would be justified in holding them chargeable with knowledge of all of the facts which due inquiry would have developed.

Thirteenth. But in order to affect one with constructive notice, it is essential that he shall have a knowledge of
43 facts and circumstances naturally and justly calculated to awaken suspicions of a fraudulent intent in the mind of a man of ordinary care and prudence, thus making it his duty to pause and inquire, and a wrong on his part not to do so before consummating the purchase. Any notice of a fraudulent intent, in order to affect a buyer, must, of course, exist prior to the completion of the sale. But if the buyer has no such notice, it is not necessary that he shall inquire into the motive of the seller in making the sale. To the giving of which the defendants duly excepted at the time.

14th. The marshal is responsible for the acts of his deputies in the execution of process and for their misconduct thereunder. Therefore, if you should find from the evidence in this case that the goods in question were wrongfully taken from the plaintiffs by the defendants, James McMurray, Charles Howard and A. J. Partridge, they being the marshal's deputies, and that the goods were taken by any of them while acting as deputy United States marshals under the authority of the writ of attachment issued out of this court in the case of E. H. Van Ingen & Company against H. Cannon, then the United States Marshal, the defendant, R. L. Walker, is equally liable with the deputy or deputies for the wrong done.

15th. In case you find for the plaintiffs, they will be entitled to recover the market value of the goods at the time they were taken by the deputy United States marshals, which it is conceded was on the 18th day of April, 1890. The market value of those goods is a matter which you will have to determine from the evidence as given upon the trial. They would also be entitled to recover interest upon the market value of the goods from the time they were taken, at the rate of six per cent per annum. The market value of the goods, with interest, will be the measure of damages in case your finding be for the plaintiff. To the giving of which defendants
44 duly excepted at the time.

Seventeenth. If you find for the plaintiffs, you must compute the interest and add it to the amount you find to be the market value of the goods, and return one gross sum. Have your verdict signed by one of your number as foreman. To the giving of which the defendants duly excepted at the time.

Eighteenth. If your verdict be for the defendants, and I also hand you a form of verdict for the defendants, it requires only that it be signed by your foreman. I think, with these suggestions, you will understand the issues and can dispose of the case.

The above are all the instructions which were given to the jury.

Each and all of the instructions above excepted to were each excepted to by the defendants at the time each was given, and at the said time the defendants made a separate exception to each instruction so excepted to.

Immediately on the incoming of the verdict in this case the defendants filed a motion for a new trial in writing in this case, and stated as reasons therefor all of the grounds upon which a new trial may be granted under and by virtue of the laws of the State of Kansas, made and provided for the granting of

new trials in civil causes. On the 2nd day of December, A. D. 1892, said motion for a new trial was argued and considered by the Court, and was by the Court overruled; to which ruling of the Court the defendants at the time duly excepted.

The foregoing bill of exceptions is a true bill and correctly and truly states that part of the proceedings, evidence, instructions given and requests refused, which are necessary to a full understanding of each and every ruling mentioned and excepted to herein. At the time each ruling was made, the defendants duly excepted to each of the rulings mentioned in the foregoing bill.

45 This bill of exceptions is signed and settled this, the 10 day of Jany. 1893, before me, the undersigned Judge, who presided at said trial, and is settled and signed within the time previously allowed by me for the settling and signing of the same.

Witness my hand, this, the above date last mentioned.

JOHN A. RINER, *Judge.*

Indorsed. No. 6510. E. Collins and W. H. Bretch, partners as Collins & Bretch, vs. R. L. Walker et al. Bill of Exceptions. Filed Jany. 10, 1893. Geo. F. Sharitt, Clerk.

46 In the United States Circuit Court of Appeals for the Eighth Circuit.

Assignment of Errors.

R. L. WALKER, JAMES MCMURRAY, CHARLES HOWARD AND A. J. PARTRIDGE, Plaintiffs in Error,

vs.

E. COLLINS AND W. H. BRETCH, (partners, as Collins & Bretch), Defendants in Error.

In the above-entitled proceeding in error from the United States Circuit Court for the First Division of the District of Kansas, the plaintiffs in error make the following assignment of errors:

First. The Court erred in admitting in evidence the deposition of E. Collins.

Second. The Court erred in excluding Exhibit 4, which the defendants offered in evidence.

Third. The Court erred in excluding Exhibit 3, which the defendants offered in evidence.

Fourth. W. H. Bretch, one of the plaintiffs in the action, testified in his own behalf that the defendants had taken from

the plaintiff's possession a portion of the stock of goods from Newton, Kansas, and converted the same to the use of the defendants, and that the action was brought to recover therefor. He also testified that the balance of the goods in the stock, which the defendants did not take, had been levied upon by the sheriff of Harvey County, Kansas; that the plaintiffs replevied the same from the sheriff, and closed them out at retail. He was then allowed to and did testify over the objection and exception of the defendants, that he realized out of said stock which he so retailed out about $5700 or $5800. Testified that he took about eight months to close them out; that they had purchased new goods and mixed with the old goods; that they paid expenses in the way of rent and
47 other expenses, and that his time and his partner's time were worth each $100 a month in closing out said stock, and that they were employed for about eight months in doing so; that they devoted all their time during the eight months in closing out *of* said stock; did nothing else, and in the continuation of the same testimony the witness stated that they had made some profit on the new goods, which they had mixed with the old; and the defendants assign that the admission of such testimony was error.

Fifth. While the witness W. H. Bretch was testifying in his own behalf in regard to closing out the balance of the stock of goods left after the marshal had carried off the goods in controversy in this action as stated in the last above assignment of error, the counsel for the plaintiffs put the following questions to the witness, to wit:

Q. I want to know what you realized out of that stock over and above all expenses of selling it?

Counsel for defendants objected to the question as incompetent, irrelevant and immaterial; the Court overruled the object—, to which ruling of the Court the defendant at the time excepted and still except.

A. About $5700 or $5800.
Q. Over and above all expenses?
A. Well, that is not counting anything for our time, and then there was a part of the goods—

Counsel for defendants. Wait a moment: We object to the last question as incompetent, irrelevant, immaterial and leading; the Court overruled the objection, to which actions and rulings of the Court the defendants at the time duly excepted and still except.

A. Then there was a part of these goods that we sold out at a profit, that we put into new goods and sold them also and made a profit, also on a part of the old goods.

And the plaintiffs in error assign that such rulings of
48 the Court were error.

SIXTH.

While the witness W. H. Bretch was testifying in his own behalf in regard to selling out the balance of the stock as stated in assignment fourth, his counsel asked the following questions:

Q. If I understand you rightly now, there seems to have been a misunderstanding here, when you made your estimate of what you realized out of these goods—you said you realized $5300 over and above all expenses; you did not in making that calculation calculate the value of any of your time, or of your partner's time, did you?

Counsel for the defendants objected to the question as incompetent, irrelevant and immaterial and leading; the Court overruled the objection, to which actions and rulings of the Court the defendants at the time duly excepted and still except.

A. No, sir.

And the defendants assign that the Court's ruling was error.

SEVENTH.

The Court erred in refusing to instruct the jury as requested by the defendants in the following instruction, to wit:

First. The jury are instructed that if H. Cannon obtained the goods in question, or any part of them, by means of fraudulent statements, as to his financial standing and then sold said goods, such sale would in law be a disposition of goods with the intent to defraud creditors.

EIGHTH.

The Court erred in refusing to instruct the jury as requested by the defendants in the following instruction, to wit:

Second. The jury are instructed that if Cannon bought the goods or any part of them, which he sold to Collins & Bretch, on the strength of false statements regarding his financial standing and credit was extended to him by reason of
49 such false statements, then a sale of such goods with an intent to use the money obtained from such sale for any other purpose than to pay for such goods, obtained by reason of false statement, would be in fraud of creditors.

NINTH.

The Court erred in refusing to instruct the jury as requested by the defendants in the following instructions, to wit:

Third. If Cannon bought the goods in question, or any part of them, on the strength of false and fraudulent statements, and then sold and disposed of the same, and then used the money received for the same to pay debts other than those incurred in the purchase of the goods, then such sale would be, in law, fraudulent, and the law would imply that it was for the purpose of defrauding creditors.

TENTH.

The Court erred in refusing to instruct the jury as requested by the defendants in the following instruction, to wit:

Fourth. If Cannon, by reason of false statements as to his financial standing, obtained the goods in question, or any part of them, and then sold them for a sum less than sufficient to pay the debt incurred, on the strength of such false statements, and knew at the time or had reason to believe that he would not have money enough to pay for such goods so obtained by false statements, then such sale would be in fraud of creditors and such creditors would have the right of possession of such goods, unless they had passed into the hands of *bona fide* purchasers for value without notice.

ELEVENTH.

The Court erred in refusing to instruct the jury as requested by the defendants in the following instructions, to wit:

50 Fifth. The jury are instructed that if Cannon obtained the goods in question by false and fraudulent statements as to his financial standing, and then sold the goods to Collins & Bretch, with the intent to prefer other certain creditors to such an extent as to leave an amount of money in his hands insufficient to pay the debts which were incurred on the strength of such false and fraudulent statements, in full, then such sale would be in fraud of creditors and would be made with the intent to defraud creditors, within the meaning of the law.

TWELFTH.

The Court erred in refusing to instruct the jury as requested by the defendants in the following instruction, to wit:

Sixth. The jury are instructed that if H. Cannon bought the goods in question, by means of false and fraudulent state-

ments and never paid for the same, and procured credit by means of false and fraudulent statements as to his financial condition, and then sold such goods to Collins & Bretch, with the intention not to pay for such goods so obtained by reason of false and fraudulent statements such sale would, in law, be in fraud of creditors; and if you find that a portion of such goods were attached in a suit in the District Court of Harvey County, Kansas, and replevined by *by* Collins & Bretch and recovered in such replevin case, and if you further find that the value of the goods replevined in such suit in the District Court of Harvey County, Kansas, was $6000.00, and if you find that the amount paid for the whole stock of goods by Collins & Bretch was $6000.00, then in such case your verdict should be for the defense in this case.

THIRTEENTH.

The Court erred in refusing to instruct the jury as requested by the defendants in the following instruction, to wit:

Seventh. The jury are further instructed that if H. Cannon bought the goods in question, or any portion of the same
51 by reason of false and fraudulent statements as to his financial standing, and then sold the same to Collins & Bretch, and that a portion of such goods were attached by parties which Cannon owed, and such goods replevined by Collins & Bretch, and Collins & Bretch in such replevin case recovered a portion of such goods, then your verdict should be only for the difference in the value of the goods so recovered in such replevin case, and the amount actually paid for the whole stock of goods by Collins & Bretch, and if you find that Collins & Bretch have recovered an amount of goods equal to the amount actually paid for the whole stock, then your verdict in this case should be for the defendants.

FOURTEENTH.

The Court erred in refusing to instruct the jury as requested by the defendants in the following instruction, to wit:

Eighth. If Cannon sold goods to Collins & Bretch which were purchased on false statements, with the intent to prefer creditors other than those whom he purchased the goods on false statements, then such sale would be in law considered made for the purpose of defrauding creditors.

FIFTEENTH.

The Court erred in refusing to instruct the jury as requested by the defendants in the following instruction, to wit:

Ninth. Where the goods or any part of them, which were sold by Cannon to the plaintiffs were gotten of the house of

E. H. Van Ingen and Company, or other wholesale houses by fraudulent statements, that in that case the burden of proof is upon the plaintiffs to show that they acted in good faith as innocent purchasers for value in the purchase of said goods from Cannon which were gotten by fraud.

SIXTEENTH.

52 The Court erred in refusing to instruct the jury as requested by the defendants in the following instruction, to wit:

Tenth. The attachment, affidavit, writ, return and other papers, and the judgment in the case of E. H. Van Ingen & Co. vs. Henry Cannon, and introduced in evidence, are legal and regular in form, and are sufficient to protect the marshal and justify him in levying on the goods in controversy, providing you find that Collins & Bretch had knowledge of fraudulent intent on the part of Cannon, or that they had sufficient notice to put a reasonable man upon inquiry in regard to such intention of Cannon to defraud his creditors.

SEVENTEEN.

The Court erred in giving the following instruction to the jury, to wit:

Second. Defendants admit that they took possession of the stock of goods and appropriated and converted a portion thereof to their own use; but they further claim that they took possession of and converted the goods, by virtue of a levy thereon of a certain order of attachment issued out of this court in favor of the firm of E. H. Van Ingen & Company against the goods and chattels of Henry Cannon, the party who sold the goods to these plaintiffs. Defendants further insist in their answer that the// alleged sale under which the plaintiffs claim title to the goods was made with the fraudulent purpose on the part of Cannon of cheating, hindering and delaying his creditors, and that the plaintiffs either intended by their purchase to aid in accomplishing that result, or at and before their purchase were chargeable in law with notice of the fraud designed by Cannon upon his creditors. This is a brief statement of the claims of the respective parties. You will have the petition of the plaintiff-, the answer of the defendants, and the reply of the plaintiffs to that
53 answer in the jury room. They are embodied in the transcript which I will hand you. To the giving of which the defendants duly excepted at the time.

EIGHTEENTH.

The Court erred in giving the following instruction to the jury, to wit:

Fifth. Parties to a business transactions are not presumed, however, to deal with each other in bad faith, but on the contrary are presumed to deal honestly and in good faith until the opposite is shown by the evidence upon the trial, and any one who alleges that such acts are done in bad faith, or for a dishonest and fraudulent purpose, takes upon himself the burden of showing that such is the case.

In other words, fraud is never presumed, and it devolves upon him who alleges fraud to show the same by satisfactory proof; i. e., proof to the satisfaction of the jury. To the giving of which defendants duly excepted at the time.

NINETEENTH.

The Court erred in giving the following instruction to the jury, to wit:

Sixth. Fraud may be shown, however, by circumstances, but the circumstances must be of such a character and so connected with the transaction in question as to lead the mind naturally to infer that the alleged fraud has been perpetrated by the parties to the transaction. To the giving of which defendants duly excepted at the time.

TWENTIETH.

The Court erred in giving the following instruction to the jury, to wit:

Eighth. The inadequacy or insufficiency of the price paid when a sale takes place may be considered by you in determining the good faith of the parties. An inadequate
54 price, however, if you should find that an inadequate price was paid in this case, is not necessarily decisive, but is simply to be viewed as a circumstance, when it exists, of greater or less weight according as the inadequacy my be great or small. The mere fact that a sale of merchandise was not made in the usual and ordinary course of business will not necessarily invalidate the sale, but you should consider this as a circumstance in determining the good faith of the parties, if you should find that the sale in question was an unusual one or not made in the ordinary manner. To the giving of which defendants duly excepted at the time.

TWENTY-FIRST.

The Court erred in giving the following instruction to the jury, to wit:

Ninth. A party who is in debt, if he finds himself unable to pay all of his creditors, may lawfully prefer some of his creditors over others; and if a merchant in embarrassed circumstances sells out his stock and applies the proceeds to the payment of a part of his creditors to the exclusion of others, he does not thereby commit a fraud on the excluded creditors if the debts which he pays are honest debts. To the giving of which defendants duly excepted at the time.

TWENTY-SECOND.

The Court erred in giving the following instruction to the jury, to wit:

Tenth. In determining whether the sale in question in this case was made in good faith or for the purpose of defeating Cannon's creditors, you should take into account the intentions and motives of both parties to the sale; that is, the purposes and intentions of Collins and Bretch and Cannon. If you should be satisfied from the evidence in the case that it has been shown that in making the sale to the plaintiffs Cannon intended to defraud his creditors;
55 yet, if, on the other hand, you should find that the plaintiffs had no intention of participating in the fraud, or to aid or assist Cannon in carrying out such fraud, in such case you should find for the plaintiffs. In other words, to render this sale void as to creditors, both seller and buyer must have acted in bad faith; and if the plaintiffs bought from Cannon in good faith they took a good title, whatever may have been Cannon's intention in effecting the sale. To the giving of which defendants duly excepted at the time.

TWENTY-THIRD.

The Court erred in giving the following instruction to the jury, to wit:

Thirteenth. But in order to affect one with constructive notice, it is essential that he shall have a knowledge of facts and circumstances naturally and justly calculated to awaken suspicions of a fraudulent intent in the mind of a man of ordinary care and prudence, thus making it his duty to pause and inquire, and a wrong on his part not to do so, before consummating the purchase. Any notice of a fraudulent intent, in order to affect a buyer, must, of course, exist prior to the completion of the sale. But if the buyer has no such notice it is not nec-

essary that he shall inquire into the motives of the seller in making the sale. To the giving of which the defendants duly excepted at the time.

TWENTY-FOURTH.

The Court erred in giving the following instruction to the jury, to wit:

Fifteenth. In case you find for the plaintiffs they will be entitled to recover the market value of the goods at the time they were taken by the Deputy United States marshals, which it is conceded was on the 18th day of April, 1890. The market value of those goods is a matter which you will have to determine from the evidence as given upon the trial.
56 They would also be entitled to recover interest upon the market value of the goods from the time they were taken at the rate of six per cent per annum. The market value of the goods, with interest, will be the measure of damages in case your finding be for the plaintiff. To the giving of which defendants duly excepted at the time.

TWENTY-FIFTH.

The Court erred in giving the following instruction to the jury, to wit:

Seventeenth. If you find for the plaintiffs you must compute the interest and add it to the amount you find to be the market value of the goods and return one gross sum. Have your verdict signed by one of your number as foreman. To the giving of which defendants duly excepted at the time.

TWENTY-SIXTH.

The Court erred in overruling the defendant's motion for a new trial.

TWENTY-SEVENTH.

The Court erred in rendering judgment in favor of the plaintiffs and against the defendants.

Wherefore, the plaintiffs in error pray that the judgment in this case be reversed, set aside, and that they be awarded a new trial.

W. E. BROWN,
Attorney for Defendants in Error.

Indorsed: No. 6510. Assignment of errors. Filed May 18, 1893. Geo. F. Sharitt, Clerk.

57 To the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Your petitioners, R. L. Walker, James McMurray, Charles Howard and A. J. Pardridge, would most respectfully represent as follows:

That in a certain action of law, tried and determined in the Circuit Court of the United States for the First Division of the District of Kansas, wherein E. Collins and W. H. Bretch, partners as Collins & Bretch, were plaintiffs, and your petitioners were defendants, judgment was rendered in favor of said plaintiffs, and against your petitioners as defendants, upon trial and the verdict of the jury, at the November term, 1892, of said Circuit Court, begun and held in the City of Topeka, in the said District of Kansas.

And your petitioners further represent that there are manifest errors in the record and proceedings in said cause in said Circuit Court, which your petitioners desire to be by your Honors examined, corrected and adjudged what of right and according to the laws and customs of the United States should be done therein in the premises.

And accordingly your petitioners pray that your Honors grant, issue and award a writ of error from your honorable court, directed to the Honorable Judges of the Circuit Court of the United States for the District of Kansas, First Division, commanding them to send to your honorable court the records and proceedings as aforesaid, with all things concerning same, together with the said writ, that your honorable court may examine and consider the same and pronounce judgment thereon, as in the judgment of your honorable court seem right and proper in the cause; and that you issue a citation to said plaintiffs, Collins and Bretch, and allow a supersedeas.

58 W. E. BROWN,
Attorney for said Petitioners.

Indorsed: No. 6510. Petition for Writ of Error. Filed May 18, 1893. Geo. F. Sharitt, Clerk. Law Office of W. E. Brown, 613 Racoma Bldg., Chicago.

59 KNOW ALL MEN BY THESE PRESENTS:

That we, R. L. Walker, James McMurray, Charles Howard and A. J. Partridge, principals, and P. I. Bonebrake & Edwin Knowles, surety, are held and firmly bound unto E. Collins and W. H. Bretch (partners as Collins & Bretch), in the full and just sum of five thousand ($5000.00) dollars, to be paid to the said E. Collins and W. H. Bretch (partners as Collins & Bretch), their heirs, executors, administrators, or as-

signs; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 25th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, lately, at the November term, A. D. 1892, of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, in a suit pending in said court between E. Collins and W. H. Bretch (partners as Collins & Bretch), as plaintiffs, and R. L. Walker, James McMurray, Charles Howard and A. J. Partridge, as defendants, judgment was rendered against the said R. L. Walker, James McMurray, Charles Howard and A. J. Partridge, and the said R. L. Walker, James McMurray, Charles Howard and A. J. Partridge have obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said E. Collins and W. H. Bretch (partners as Collins & Bretch), citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said R. L. Walker, James McMurray, Charles Howard and A. J. Partridge shall prosecute said writ to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

R. L. WALKER,
JAMES McMURRAY,
CHARLES HOWARD AND
A. J. PARTRIDGE. [SEAL.]
By their atty., W. E. BROWN, [SEAL.]
P. I. BONEBRAKE, [SEAL.]
EDWIN KNOWLES, [SEAL.]

May 20th, 1893.

Approved by

JOHN A. RINER, *Judge.*

STATE OF KANSAS, } ss.
SHAWNEE COUNTY. }

P. I. Bonebrake and Edwin Knowles, being first duly sworn, says that they are each worth the sum of $2500.00, over and above all debts, exemptions and liabilities.

P. I. BONEBRAKE.
EDWIN KNOWLES.

Subscribed and sworn to before me this 18th day of May, A. D. 1893.

[SEAL]

GEO. F. SHARITT,
Clerk U. S. Circuit Court,
District of Kansas.

No. 6510. United States Circuit Court, First Division of the Judicial District of Kansas. Collins & Bretch vs. R. L. Walker et al. Bond. $5000.00. Filed May 22d, 1893. Geo. F. Sharitt, Clerk.

60 UNITED STATES OF AMERICA, } ss.
DISTRICT OF KANSAS. }

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in said court in the case of Collins & Bretch, plaintiffs, vs. R. L. Walker et al., defendants. No. 6510. I further certify that the original writ of error is returned herewith and made a part of this transcript.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said District of Kansas, this 21" day of June, A. D. 1893.

The Seal of the Circuit Court of the United States, District of Kansas. 1862.

GEO. F. SHARITT, *Clerk.*

Filed Jul. 18, 1893. John D. Jordan, Clerk.

72 And on the 18th day of July, A. D. 1893, there was filed in the office of the clerk of said United States circuit court of appeals an original citation in said cause, which, with the acknowledgment of service thereon, is in words and figures following, to wit:

THE UNITED STATES OF AMERICA:

To E. Collins and W. H. Bretch, partners as Collins and Bretch, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the first division of the judicial district of Kansas, wherein R. L. Walker, James McMurray, Charles Howard, and A. J. Partridge are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable John A. Riner, judge of the United States district court for the district of Wyoming, assigned to hold the circuit court of the United States for the district of Kansas, this 20th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

JOHN A. RINER,
United States District Judge for the District of Wyoming, Assigned to Hold the Circuit Court for the District of Kansas.

NEWTON, KANSAS, *May 31st*, 1893.

We, the undersigned, attorneys for E. Collins and W. H. Brecht, partners as Collins & Brecht, defendants in error mentioned in the within citation, do hereby acknowledge service of the within citation.

Witness our hands this 31st day of May, A. D. 1893.

C. S. BOWMAN AND
C. BUCHER,
Attorneys for Defendants in Error.

73 Endorsed: No. 325. United States circuit court, first division of the judicial district of Kansas. Collins & Bretch *vs.* R. L. Walker *et al.* Citation. Filed July 18, 1893. John D. Jordan, clerk.

And on the 18th day of July, A. D. 1893, an appearance of counsel for plaintiffs in error was filed in the clerk's office of said United States circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1893.

R. L. WALKER *et al.*, Plaintiffs in Error,
vs.
E. COLLINS *et al.* } No. 325.

The clerk will enter my appearance as counsel for the plaintiffs in error.

W. E. BROWN,
Attorney for Plaintiffs in Error,
613 *Tacoma Building, Chicago.*

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1893. No. 325. R. L. Walker *et al.*, pl'ffs in error, *vs.* E. Collins *et al.* Appearance. Filed July 18th, 1893. John D. Jordan, clerk. W. E. Brown, counsel for plaintiffs in error, 613 Tacoma building, Chicago, Ill.

And on the 18th day of July, A. D. 1893, an appearance of counsel for defendants in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1893.

R. L. WALKER *et al.*, Plaintiffs in Error,
vs.
E. COLLINS *et al.*, Defendants in Error. } No. 325.

The clerk will enter my appearance as counsel for the defendants in error.

C. BUCHER,
Newton, Kansas.

74 Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1893. No. 325. R. L. Walker *et al.*, pl'ffs in error, *vs.* E. Collins *et al.* Appearance. Filed July 18th, 1893. John D. Jordan, clerk. C. Bucher, Newton, Kansas, counsel for defendants in error.

And on the 7th day of August, A. D. 1893, there was filed in the clerk's office of said United States circuit court of appeals a stipulation as to record to be printed in words and figures following, to wit:

Stipulation.

In the United States Circuit Court of Appeals for the Eighth Circuit.

R. L. WALKER, JAMES MCMURRAY, CHAS. HOWARD, and A. J. PARTRIDGE, Plaintiffs in Error,
vs.
E. COLLINS and W. H. BRETCH (Partners as Collins and Bretch), Defendants in Error.

It is hereby agreed by and between the parties to this cause that the invoice and itemized statement, which is Exhibit "A," attached to the petition or complaint, which sets forth the cause of action of the plaintiff-, shall not be printed with the record in this cause, but the body of said petition or complaint and the balance of the record shall be printed after excluding Exhibit "A," which is said invoice.

W. E. BROWN,
Attorneys for Plaintiffs in Error.
BOWMAN & BUCHER,
Attorneys for Defendants in Error.

Endorsed: R. L. Walker *et al. vs.* Collins & Bretch. Stipulation. Filed Aug. 7th, 1893. John D. Jordan, clerk.

And on the 14th day of November, A. D. 1893, in the record of the proceedings of said United States circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eight Circuit, May Term, A. D. 1893.

TUESDAY, *November 14th*, 1893.

75 R. L. WALKER *et al.*, Plaintiffs in Error,
vs.
E. COLLINS *et al.*, Defendants in Error. } No. 325.

In error to the circuit court of the United States for the district of Kansas.

This cause having been called for hearing in its regular order and no counsel appearing to argue same and no brief having been filed on behalf of defendant in error, this cause was argued by Mr. W. E. Brown on behalf of plaintiffs in error, and the cause was thereupon submitted to the court upon the transcript of record from said circuit court and the brief filed on behalf of plaintiffs in error.

And on the 4th day of December, A. D. 1893, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1893.

MONDAY, *December 4th*, 1893.

R. L. WALKER, JAMES MCMURRAY, CHARLES HOWARD, and A. J. PARTRIDGE, Plaintiffs in Error,
vs.
E. COLLINS and W. H. BRETCH, Partners as Collins and Bretch, Defendants in Error.
No. 325.

In error to the circuit court of the United States for the district of Kansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kansas and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of said circuit court in this
76 cause be, and the same is hereby, affirmed with costs, and that E. Collins and W. H. Bretch, partners as Collins and Bretch, recover against R. L. Walker, James McMurray, Charles Howard, and A. J. Partridge the sum of twenty dollars for their costs herein and have execution therefor.

December 4th, 1893.

And on the 4th day of December, A. D. 1893, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

77 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1893.

R. L. WALKER, JAMES MCMURRAY, Charles Howard, and A. J. Partridge, Plaintiffs in Error,
vs.
E. COLLINS and W. H. BRETCH, Partners as Collins & Bretch, Defendants in Error.
No. 325. In Error to the Circuit Court of the United States for the District of Kansas.

Mr. W. E. Brown, for plaintiff- in error.

Mr. C. S. Bowman and Mr. Charles Bucher, for defendants in error.

Before Caldwell and Sanborn, circuit judges.

CALDWELL, circuit judge, delivered the opinion of the court:

This is the second appearance of this case in this court. It was before the court at the May term, 1892, and reference is made to the opinion then delivered (4 U. S. App., 406) for a full statement of the case. Upon the second trial in the lower court, Collins & Bretch, the plaintiffs in that court, recovered judgment and the defendants thereupon sued out this writ of error.

It is assigned for error that the lower court permitted a deposition of a witness to be read in evidence which had not been on file one day before the day of trial. This assignment of error is rested on paragraph 4456, section 361, of the Civil Code of Kansas, which provides that "every deposition intended to be read in evidence on the trial must be filed at least one day before the day of trial."

The deposition was taken and returned into court under the provisions of sections 863–865 of the Revised Statutes of the United States. A deposition taken under the provisions of these sections may be read at any time after it is filed and opened. The section of the Kansas code quoted, does not apply to depositions taken, under the act of Congress, to be used in the Federal courts.

78 Moreover, the time that must elapse before a deposition can be read, which has been duly taken and filed in the Federal court, is so purely a matter relating to the orderly and convenient conduct of the business of the court, that a rule established by a State statute regulating the practice on the subject in the State court, can have no application to the Federal courts, and the act of Congress adopting the State practice "as near as may be" does not adopt such a rule.

The codes of practice in some of the States descend into great detail and prescribe the names and number of the court dockets, and direct how the cases shall be entered thereon, and prescribe the time and order in which the cases shall be called for trial and require the court to devote a certain part of each day of the term to a particular kind of business and contain other requirements of like character. (See Mansfield's Dig. Stat. Ark., secs. 5111–5124.) The section of the code of Kansas under consideration, belongs to this class of rules.

The constitution of the United States circuit court is such that the rules regulating in detail the time and mode of conducting the business in a State court are not applicable to that court. As to such rules and regulations the act of Congress adopting the State practice is not mandatory.

This section of the Kansas code stands on the same footing with State statutes which prescribe the time and mode of charging juries, and the papers which shall be permitted to go to them, in their retirement; and statutes which make it the duty of the court to require the jury to answer special interrogatories and other like requirements, all of which have been held to be inapplicable to the Federal courts. Nudd *v.* Burrows, 91 U. S., 426; Indianapolis R. R. Co. *v.* Horst, 93 U. S., 291; Mutual Accident Association *v.* Barry, 131 U. S., 100, 120; O'Connell *v.* Reed *et al.*, 56 Fed. Rep., 531.

The defendants offered to introduce in evidence a copy of an affidavit made and filed in the State court by one of the plaintiffs to procure a writ of replevin for the goods in controversy; the court excluded the paper, and this ruling is assigned for error.

Waiving any consideration of the question whether the copy offered in evidence was properly proved or authenticated, the ruling of the court was clearly right on other grounds.

The plaintiffs purchased a stock of goods from one Cannon, for

$6,000. The defendants afterwards seized the goods on a writ of attachment as the property of Cannon. After a portion of the goods had been disposed of, the plaintiffs replevied the remainder, alleging in the affidavit to procure the writ of replevin, that the goods were worth $6,000.

The defendants contended that as the plaintiffs recovered the goods sued for in the replevin suit, and these goods were alleged to be worth $6,000 in the affidavit filed to procure the writ of replevin, and the plaintiffs had only paid $6,000.00 for the whole stock, they had lost nothing by the marshal taking and disposing of a part of their goods. And it was solely to support this contention that the affidavit was offered in evidence. The bill of exceptions states that the affidavit was offered in evidence "for the purpose of show-
79 ing that in the replevin suit against the sheriff, plaintiffs had recovered from the sheriff the goods left by the defendants in the store at Newton; that these goods were worth $6,000.00, the full amount of the purchase price of the whole stock paid by plaintiffs to Cannon; that therefore, plaintiffs had lost nothing by the defendants taking what they took in this case, and that as against the attaching creditors whom the defendants represented in this case the plaintiffs could not recover the goods in question in this action." It is scarcely necessary to say that the affidavit could not be received in evidence for any such purpose, and it was offered for no other. The plaintiffs were entitled to the benefit of their bargain, and if the goods they purchased were worth more than $6,000.00, it is not perceived upon what principle the marshal and his deputies could take the excess over $6,000.00, and claim the plaintiffs were remediless because they only paid that sum for the whole stock of goods.

Other grounds for the admission of the affidavit are urged for the first time in this court. We held in the case of German Insurance Company *v.* Frederick (— Fed. Rep. —), that when a party states to the trial court the purpose for which a document is offered in evidence, and it is incompetent for that purpose, the party will not be permitted to change his ground in the appellate court and insist that the lower court erred in not admitting it for a purpose not disclosed to that court and upon which its judgment was not invoked. We may add that an examination of the record shows that even if the affidavit was admissible in evidence, it was in view of other evidence and the conceded facts in the case, not of sufficient importance to justify our reversing the judgment on account of its exclusion.

To an instruction comprising two-thirds of a printed page and containing a statement of the pleadings and issues in the case, the defendants entered a general exception. The instruction excepted to begins with the statement that the "defendants admit that they took possession of the stock of goods and appropriated and converted a portion thereof to their own use. * * *"

In this court it is said that all of the defendants did not make this admission, but that one of them denied that he had anything to do with taking the goods. The defendants were the marshal and

his deputies. They all had more or less to do with the service and execution of the writ of attachment upon which the goods were seized, and it is obvious from an examination of the record that the case was tried upon the understanding and theory that all the defendants were liable if any of them were. Furthermore, if the statement of the judge as to the admission of the defendants in the particular mentioned, was not well founded in fact, they should have called the court's attention to the error at the time, and if it was not corrected, should have leveled their exception distinctly at that statement in the charge. Gulf, Colorado, etc., R'y Co. *v.* Johnson, 10 U. S. App., 629 s. c., 54 Fed. Rep. 474; Railroad Co. *v.* Varnell, 98 U. S., 479.

The court charged the jury that "Parties to a business transaction are not presumed, however, to deal with each other in bad faith, but, on the contrary, are presumed to deal honestly and in
80 good faith until the opposite shown by the evidence upon the trial, and any one who alleges that such acts are done in bad faith, or for a dishonest and fraudulent purpose, takes upon himself the burden of showing that such is the case. In other words, fraud is never presumed, and it devolves upon him who alleges fraud to show the same by satisfactory proof, *i. e.*, proof to the satisfaction of the jury."

The defendants excepted generally to this charge, and in this court limit the exception to the last clause of the charge which states that "it devolves upon him who alleges fraud to show the same by satisfactory proof—*i. e.*, proof to the satisfaction of the jury." The objection to the charge is that the court should have told the jury that fraud may be established by a preponderance of the evidence, and not that it must be established by "satisfactory proof—*i. e.*, satisfactory proof to the jury." The charge is taken almost literally from the opinion of the Supreme Court of the United States in the case of Jones *v.* Simpson, 116 U. S., 609, 615. In that case the court said: "It devolves on him who alleges fraud to show the same by satisfactory proof."

In Hatch *v.* Bayley, 12 Cush., 30, the trial court instructed the jury, "that it was necessary that the defendant should adduce stronger proof to establish fraud, etc., than is necessary to prove a debt or a sale; that the presumption was, that every man conducted honestly without fraud; and when fraud was alleged, the proof must not only be sufficient to establish an innocent act, but to overcome the presumption of honesty."

Considering an exception to these remarks of the trial judge, the supreme judicial court of Massachusetts, speaking by Chief Justice Shaw, said: "As we understand them, the judge intended to say, that he who alleges fraud against another, is bound to prove it. That every man is presumed to act honestly until the contrary is proved; that he who charges another with an act involving moral turpitude or legal delinquency, must prove it; that as this is an allegation against a presumption of fact, it requires somewhat more evidence than if no presumption existed. It carried no direction as to the amount of evidence required, or as to the nature of the

evidence, whether positive or circumstantial, but only that, on the whole, it must be somewhat stronger; and we cannot perceive that such a direction is incorrect. The ordinary direction to the jury is that he who charges fraud must prove it to the satisfaction of the jury. We think it not contrary to any rule or principle of law for the judge to inform the jury, that as the charge of fraud is a charge against a presumption of fact, perhaps often a slight one, yet the jury, in order to be satisfied, might require somewhat stronger evidence than would suffice to prove the acknowledgment of an obligation, or the delivery of a chattel." This case is cited approvingly by the Supreme Court of the United States in Jones *v.* Simpson, *supra.* And to the same effect are the following authorities: Greer *v.* Caldwell, 14 Ga., 207; Bierne's Appeal, 92 Pa. St., 265; Babbitt *v.* Dotten, 14 Fed. Rep., 19; Lynn *v.* Baltimore & Ohio R. R. Co., 60 Md., 413; Bigelow's Law of Fraud, pp. 123, 145; Second Rice on Evidence, page 953; Frick *v.* Mulholland (Wis.), 4 N. W. Rep., 528.

81 In Bouvier's Law Dictionary (14 ed.) the term "satisfactory evidence" is defined to be "that evidence which is sufficient to produce a belief that the thing is true; in other words, it is credible evidence."

The Century Dictionary defines "satisfactory evidence or sufficient evidence" to be "such evidence as in amount is adequate to justify the court or jury in adopting the conclusion in support of which it is adduced." No better definition of these terms can be given, and it was in this sense presumably that the jury understood them.

A separate examination of the other exceptions is not necessary as none of them is of any general importance. They have all been examined carefully and we are satisfied that none of them has any merit.

Finding no error in the record, the judgment below is affirmed.

Filed December 4, 1893.

82 And on the eighth day of January, A. D. 1894, there was filed in the clerk's office of said United States circuit court of appeals in said cause a petition for writ of error in words and figures following, to wit:

To the honorable judges of the Supreme Court of the United States:

Your petitioners, R. L. Walker, James McMurray, Charles Howard, and A. J. Partridge, would most respectfully represent as follows:

That in a certain proceeding in error in the circuit court of appeals for the eighth circuit of the United States in which your petitioners were plaintiffs in error and E. Collins and W. H. Bretch, partners as Collins & Bretch, were defendants in error, brought in said circuit court of appeals upon a writ of error granted to your petitioners to the circuit court of the United States for the first division of the district of Kansas, to review and reverse a judgment entered against your petitioners in said circuit court in an action at

law wherein said E. Collins and W. H. Bretch, partners as Collins & Bretch, were plaintiffs and your petitioners were defendants, judgment was rendered by said circuit court of appeals affirming the judgment against your petitioners, entered and rendered against your petitioners in said circuit court.

That the judgment of said circuit court of appeals affirming said judgment was rendered at the December, A. D. 1893, term of said court.

Your petitioners further represent that there are manifest errors in the record and proceedings in said cause in said circuit court of appeals and in said circuit court which your petitioners desire to be by your honorable court examined, corrected, and adjudged what of right and according to the laws and customs of the United States should be done therein in the premises.

And your petitioners further represent to your honors that upon such examination, correction, and adjudication your petitioners will be entitled to a reversal of the judgment against your petitioners rendered by said circuit court of appeals and by said circuit court in said cause mentioned, and will be entitled on account of the manifest errors therein to a new trial in said cause.

Your petitioners further represent that the jurisdiction of the said circuit court of the United States for the first division of the
83 district of Kansas in and to said action aforementioned was not dependent and is not dependent entirely or even partly upon the opposite parties to said suit and controversy, being aliens and citizens of the United States or citizens of different States; that said action at law was not and is not a case arising under the patent laws of the United States, nor under the revenue laws of the United States, nor under the criminal laws of the United States, nor is said action an admiralty case, but your petitioners aver and represent to your honors that said controversy was an action at law brought by the plaintiffs therein against the defendants therein to recover for the alleged taking and conversion of a stock of merchandise which, it was alleged, had been taken and converted by your petitioners, defendants therein.

Your petitioners further represent to your honors that the jurisdiction of said circuit court for the first division of the district of Kansas in and to said action was dependent and is dependent entirely upon the fact that the controversy between the plaintiffs and the defendants in said action was one arising under the laws of the United States.

Your petitioners further represent that the amount in controversy in said action in said circuit court and in said proceeding in error in said circuit court of appeals exceeded and exceeds the amount and value of one thousand dollars besides costs.

And accordingly your petitioners pray that your honors grant, issue, and award a writ of error from your honorable court, directed to the honorable judges of the United States circuit court of appeals for the eighth judicial circuit, commanding them to send to your honorable court the records and proceedings as aforesaid in said cause, with all things concerning the same, together with said writ,

that your honorable court may examine and consider the same and pronounce judgment thereon as in the judgment of your honorable court may seem right and proper in the cause, and that you issue a citation to the said E. Collins and W. H. Bretch, partners as Collins & Bretch, and allow your petitioners a supersedeas.

W. E. BROWN,
Attorney for said Petitioners.

84 Endorsed: Supreme Court of U. S. Walker *et al. vs.* Collins *et al.* Petition for writ of error. Filed January 8th, 1894. John D. Jordan, clerk. W. E. Brown, att'y for plaintiffs in error.

And on the eighth day of January, A. D. 1894, there was filed in the clerk's office of said circuit court of appeals an assignment of errors in words and figures following, to wit:

In the Supreme Court of the United States.

R. L. WALKER, JAMES MCMURRAY, CHARLES HOWARD, and A. J. PARTRIDGE, Plaintiffs in Error,
vs.
E. COLLINS and W. H. BRETCH, Partners as Collins & Bretch, Defendants in Error.

Assignment of Errors.

Come now the plaintiffs in error and make the following assignment of errors, to wit:

First.

The circuit court erred in admitting in evidence the deposition of E. Collins, one of the plaintiffs in the action, when the said deposition had not been on file at least one day before the day of trial, and the circuit court of appeals erred in not sustaining this assignment of error and in not reversing the judgment of the circuit court on account thereof.

Second.

The circuit court erred in excluding Exhibit 4, which the defendants offered in evidence, and which was a copy of an affidavit in replevin signed and sworn to by E. Collins, one of the plaintiffs, and filed by him in an action of replevin in the district court of Harvey county, Kansas, in which, among other things, he affirmed and testified that the goods which he replevined in that case and which were the balance of the Cannon stock left after the marshal had carried away the goods in controversy in this case were worth $6,000; and the circuit court of appeals erred in not sustain-
85 ing this assignment of error and in not reversing the judgment of the circuit court on account thereof.

Third.

W. H. Bretch, one of the plaintiffs in the action, testified in his own behalf that the balance of the goods in the stock which the

defendants did not take had been levied upon by the sheriff of Harvey county, Kansas; that the plaintiffs replevined the same from the sheriff and closed them out at retail. He was then allowed to and did testify, over the objection and exception of the defendants, that he realized out of said stock which he so retailed out about $5,700 or $5,800 over and above expenses, and then testified that he only realized $5,300 over and above expenses; that he and his partner were about eight months in closing them out; that during this time they purchased new goods and mixed them with the old goods; that they paid expenses in the way of rent and paid themselves each $100 a month and paid other expenses, and the plaintiffs in error assign that the ruling of the circuit court in admitting said testimony was error, and the circuit court of appeals erred in not sustaining said assignment of error and in not reversing the judgment of the circuit court on account thereof.

Fourth.

The circuit court erred in refusing to instruct the jury, as requested by the defendants, in the following instruction, to wit:

Tenth. The attachment, affidavit, writ, return and other papers, and the judgment in the case of E. H. Van Ingen & Co. *vs.* Henry Cannon and introduced in evidence are legal and regular in form and are sufficient to protect the marshal and justify him in levying on the goods in controversy, providing you find that Collins & Bretch had knowledge of fraudulent intent on the part of Cannon or that they had sufficient notice to put a reasonable man upon inquiry in regard to such intention of Cannon to defraud his creditors.

And the circuit court of appeals erred in refusing to sustain said assignment of error and in not reversing the judgment of the circuit court on account thereof.

Fifth.

The circuit court erred in giving the following instruction to the jury, to wit:

86 Fifth. Parties to a business transaction are not presumed, however, to deal with each other in bad faith, but, on the contrary, are presumed to deal honestly and in good faith until the opposite is shown by the evidence upon the trial, and any one who alleges that such acts are done in bad faith or for a dishonest and fraudulent purpose takes upon himself the burden of showing that such is the case. In other words, fraud is never presumed, and it devolves upon him who alleges fraud to show the same by satisfactory proof—*i. e.*, proof to the satisfaction of the jury.

And the circuit court of appeals erred in not sustaining said assignment of error and in not reversing the judgment of the circuit court on account thereof.

Sixth.

The circuit court erred in giving the following instruction to the jury, to wit:

Sixth. Fraud may be shown, however, by circumstances, but the circumstances must be of such a character and so connected with the transaction in question as to lead the mind naturally to infer that the alleged fraud has been perpetrated by the parties to the transaction.

And the circuit court of appeals erred in not sustaining this assignment of error and in not reversing the judgment of the circuit court on account thereof.

Seventh.

The circuit court erred in giving the following instruction to the jury, to wit:

Eighth. The inadequacy or insufficiency of the price paid when a sale takes place will be considered by you in determining the good faith of the parties. An inadequate price, however, if you should find that an inadequate price was paid in this case, is not necessarily decisive, but is simply to be viewed as a circumstance when it exists of greater or less weight according as the inadequacy may be great or small. The mere fact that a sale of merchandise was not made in the usual and ordinary course of business will not necessarily invalidate the sale, but you should weigh this as a circumstance in determining the good faith of the parties, if you find that the sale in question was an unusual one or not made in the ordinary manner.

87 And the circuit court of appeals erred in not sustaining this assignment of error and in not reversing the judgment of the circuit court on account thereof.

Eighth.

The circuit court erred in giving the following instruction to the jury, to wit:

Tenth. In determining whether the sale in question in this case was made in good faith or for the purpose of defeating Cannon's creditors you should take into account the intentions and motives of both parties to the sale—that is, the purposes and intentions of Collins and Bretch and Cannon. If you should be satisfied from the evidence in the case that it has been shown that in making the sale to the plaintiffs Cannon intended to defraud his creditors, yet if, on the other hand, you should find that the plaintiffs had no intention of participating in the fraud or to aid or assist Cannon in carrying out such fraud, in such case you should find for the plaintiffs. In other words, to render this sale void as to creditors both seller and buyer must have acted in bad faith, and if the plaintiffs bought from Cannon in good faith they took a good title, whatever may have been Cannon's intention in effecting the sale.

And the circuit court of appeals erred in not sustaining this assignment of error and in not reversing the judgment of the circuit court on account thereof.

Ninth.

The circuit court erred in overruling the defendants' motion for a new trial, and the circuit court of appeals erred in not sustaining this assignment of error and in not reversing the judgment of the circuit court on account thereof.

Tenth.

The circuit court erred in rendering judgment in favor of the plaintiffs and against the defendants, and the circuit court of appeals erred in not sustaining this assignment of error and in not reversing the judgment of the circuit court on account thereof.

Wherefore the plaintiffs in error pray that the judgment of the circuit court of appeals be reversed with a mandate to reverse the judgment of the circuit court and grant the defendants a new trial.

W. E. BROWN,
Attorney for Plaintiffs in Error.

88 Endorsed: Supreme Court of United States. Walker *et al.* *vs.* Collins *et al.* Assignment of errors. Filed January eighth, 1894. John D. Jordan, clerk. W. E. Brown, attorney for plaintiffs in error.

And on the eighth day of January, A. D. 1894, there was filed in the clerk's office of said circuit court of appeals a supersedeas bond in words and figures following, to wit:

Know all men by these presents that we, R. L. Walker, James McMurray, Charles Howard, and A. J. Partridge, as principals, and E. H. Van Ingen & Co. and Henry S. Van Ingen, as sureties, are held and firmly bound unto E. Collins and W. H. Bretch, partners as Collins & Bretch, in the full and just sum of ($8,000) eight thousand dollars, to be paid to the said E. Collins and W. H. Bretch, partners as Collins & Bretch, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of December, A. D. 1893.

Whereas lately, at the December term, A. D. 1893, of the United States circuit court of appeals for the eighth circuit, in a proceeding in error pending in said court between R. L. Walker, James McMurray, Charles Howard, and A. J. Partridge, as plaintiffs in error, and E. Collins and W. H. Bretch, partners as Collins & Bretch, defendants in error, which proceeding in error was instituted upon a writ of error from said circuit court of appeals to the circuit court of the United States for the first division of the district of Kansas for the purpose of having reviewed in said circuit court of appeals a judgment rendered at the November, A. D. 1892, term of said circuit court against the said R. L. Walker, James McMurray, Charles Howard, and A. J. Partridge in favor of the said E. Collins and W.

H. Bretch, partners as Collins & Bretch, in an action pending in said circuit court, in which the said E. Collins and W. H. Bretch, partners as Collins & Bretch, were plaintiffs and the said
89 R. L. Walker, James McMurray, Charles Howard, and A. J. Partridge were defendants, judgment was rendered by the said circuit court of appeals against the said R. L. Walker, James McMurray, Charles Howard, and A. J. Partridge, affirming the said judgment of the said circuit court; and whereas the said R. L. Walker, James McMurray, Charles Howard, and A. J. Partridge have obtained a writ of error to reverse the said judgment of the said circuit court of appeals and of the said circuit court in the Supreme Court of the United States, and a citation directed to the said E. Collins and W. H. Bretch, partners as Collins & Bretch, citing and admonishing them to be and appear in the Supreme Court of the United States, at the city of Washington, thirty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said R. L. Walker, James McMurray, Charles Howard, and A. J. Partridge shall prosecute said writ to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

R. L. WALKER. [SEAL.]
JAMES McMURRAY. [SEAL.]
CHARLES HOWARD. [SEAL.]
A. J. PARTRIDGE. [SEAL.]
E. H. VAN INGEN & CO. [SEAL.]
HENRY S. VAN INGEN. [SEAL.]

January 2, 1894.

Approved by—
DAVID J. BREWER,
Associate Justice Sup. Ct.

UNITED STATES OF AMERICA, }
State — Illinois, County of Cook, } *ss:*

Henry S. Van Ingen, being first duly sworn, deposes and says that he is surety on the above and foregoing obligation; that he is a citizen and resident of the State of Wisconsin, and that he is
90 worth the sum placed opposite his signature below over and above all his debts, exemptions, and liabilities.

HENRY S. VAN INGEN. $16,000.

I, Rowland S. Ludington, a notary public within and for the county of Cook, State aforesaid, do hereby certify that the above and foregoing affidavit was duly sworn to by Henry S. Van Ingen, who personally appeared before me for that purpose.

Witness my hand and official seal this twenty-seventh day of December, A. D. 1893.

[SEAL.] ROWLAND S. LUDINGTON,
Notary Public.

Endorsed: Supreme Court of United States. Walker *et al. vs.* Collins *et al.* Supersedeas undertaking. Filed Jan. 8, 1893. John D. Jordan, clerk. W. E. Brown, att'y for pl'ffs in error.

And on the eighth day of January, A. D. 1894, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned.

91 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of appeals of the United States for the eighth judicial circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you or some of you, between R. L. Walker, James McMurray, Charles Howard, and A. J. Partridge, plaintiffs in error, and E. Collins and W. H. Bretch, partners as Collins & Bretch, defendants in error, a manifest error hath happened, to the great damage of the said R. L. Walker, James McMurray, Charles Howard, and A. J. Partridge, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 1st day of February, 1894, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error
92 what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 2nd day of January, in the year of our Lord one thousand eight hundred and ninety-four.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice.

93 UNITED STATES OF AMERICA, } *ss:*
Eighth Judicial Circuit, }

I, John D. Jordan, clerk of the United States circuit court of appeals of the eighth circuit, in obedience to the command of the within writ, do hereby transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings and

also of the opinion of the court in the within-entitled cause, with all things concerning the same.

In witness whereof I have hereunto subscribed my name and affixed the seal of the said circuit court of appeals, at my office, in the city of St. Louis, in the said circuit, this the 11th day of January, 1894.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals of the Eighth Circuit.

[Endorsed:] Supreme Court of the United States. Walker *et al. vs.* Collins *et al.* Writ of error. Filed Jan. 8, 1894. John D. Jordan, clerk. W. E. Brown, att'y for p'ffs in error.

94 And on the tenth day of January, A. D. 1894, a citation was filed in the clerk's office of said United States circuit court of appeals in said cause, the original of which is hereto attached and herewith returned.

95 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to E. Collins and W. H. Bretch, partners as Collins & Bretch, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the 1st day of February, 1894, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein R. L. Walker, James McMurray, Charles Howard, and A. J. Partridge are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 2nd day of January, in the year of our Lord one thousand eight hundred and ninety-four.

DAVID J. BREWER,
Associate Justice, Sup. Ct.

96 The undersigned, being the attorney of record in both the circuit court and the circuit court of appeals for E. Collins and W. H. Bretch and being still their attorney in the proceeding in error mentioned in the foregoing citation in the Supreme Court of the United States, do hereby acknowledge service of the foregoing citation by a true duplicate thereof being delivered to the undersigned on the eighth day of January, A. D. 1894.

Witness the hand and seal of said attorney- on the eighth day of January, A. D. 1894.

C. S. BOWMAN. [SEAL.]
CHAS. BUCHER,
By C. S. BOWMAN. [SEAL.]
BOWMAN & BUCHER, [SEAL.]
Attorney- for Defendants in Error.

[Endorsed:] Supreme Ct. of U. S. Walker *et al. vs.* Collins *et al.* Original citation. Filed Jan. 10, 1894. John D. Jordan, clerk. W. E. Brown, att'y for pl'ffs in error.

97 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing — pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of R. L. Walker *et al.*, plaintiffs in error, *vs.* E. Collins *et al.*, defendants in error, No. 325, December term, 1893, as the same remain upon the files and records of said United States circuit court of appeals.

I further certify that the original writ of error and citation in said cause are hereto attached and herewith returned, and that a true copy of said writ of error is lodged in my office for the use of the defendants in error, as required by law.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this eleventh day of January, 1894.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

98 In the Supreme Court of the United States.

R. L. WALKER *et al.*, Plaintiffs in Error,
vs.
E. COLLINS *et al.*, Defendants in Error.

Stipulation.

It is hereby stipulated and agreed that the invoice attached to the petition in the transcript, and which is Exhibit "A" in said petition, shall be left out of the printed record in this court, and that the clerk shall cause the balance of the record to be printed, excluding said invoice.

W. E. BROWN,
Attorney for Plaintiffs in Error.
C. S. BOWMAN AND
A. P. JETMORE AND
C. BUCHER,
Attorneys for Defendants in Error.

99 [Endorsed:] Case No. 15,484. Supreme Court U. S., October term, 1894. Term No., 626. R. L. Walker *et al.*, pl'ffs in error, *vs.* E. Collins *et al.*, partners, &c. Stipulation to omit parts of record in printing. Filed Dec. 28, 1894.

Endorsed on cover: Case No. 15,484. U. S. circuit court of appeals, 8th circuit. Term No., 316. R. L. Walker, James McMurray, Charles Howard, & A. J. Partridge, plaintiffs in error, *vs.* E. Collins & W. H. Bretch, partners as Collins & Bretch. Filed January 15th, 1894.

Office Supreme Court U. S.
FILED,
APR 23 1896
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 416 OF OCTOBER TERM, A. D. 1895.

General No. 15484.

R. L. WALKER, JAMES McMURRAY, CHARLES HOWARD and A. J. PARTRIDGE,
Plaintiffs in Error.

vs.

E. COLLINS and W. H. BRETCH, Partners as Collins & Bretch,
Defendants in Error.

Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF PLAINTIFFS IN ERROR.

W. E. BROWN,
Attorney for Plaintiffs in Error.

DONOHUE & HENNEBERRY, PRINTERS, CHICAGO.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 316 OF OCTOBER TERM, A. D. 1895.

General No. 15484.

R. L. WALKER, JAMES McMURRAY, CHARLES HOWARD and A. J. PARTRIDGE,
Plaintiffs in Error.

vs.

E. COLLINS and W. H. BRETCH, Partners as Collins & Bretch,
Defendants in Error.

} Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT.

This action was commenced on the 18th day of April, 1890, by the defendants in error against the plaintiffs in error, in the District Court of Harvey County, Kansas. The plaintiffs in the action claim to recover damages against the defendants in the sum of ten thousand dollars ($10,000) for an alleged taking

and conversion of a certain stock of merchandise, which the plaintiffs claim to own. The defendants answered, admitting that two of the defendants had taken and converted a portion of the goods in controversy, but denying that the other defendants had anything to do with the taking or converting of said goods. The defendants justified the taking by Howard and Partridge by alleging and proving that they had taken the same as United States deputy marshals serving under the defendant, R. L. Walker, as marshal, all within and for the State and District of Kansas, on an attachment writ, as the property of one Cannon, defendant in the writ, and that the goods belonged to said Cannon. The cause was removed to the United States Circuit Court for the District of Kansas, on the ground that it was one arising under the laws of the United States. The facts out of which the controversy arose are briefly, as follows:

In February, 1890, the firm of E. H. Van Ingen & Co., of the city of New York, sold a large quantity of merchandise to one H. Cannon, of Newton, Kansas. Cannon, during the latter part of the winter and spring of 1890, purchased a large amount of merchandise, not only from E. H. Van Ingen & Co., but from others. These goods were obtained by false, wilful and fraudulent statements of his financial condition. He made written statements and sent to these wholesale merchants in New York City that he was worth many thousands of dollars over and above his liabilities, and stated that he was in debt for all liabilities only in the amount of $1,640. On the trial of this case he admitted and testified that at the time of making this wilful, false and fraudulent statement he

was in debt over $5,000, owing $2,000 to his bank at Newton, Kansas, and several thousand dollars to other parties, and on these statements had run up his indebtedness to the sum of over $12,000. He purchased of these wholesale merchants, according to his own testimony, between $5,000 and $6,500 worth of new goods and placed them in his stock, which already contained nearly $9,000 worth of goods, and, with fixtures and accounts, amounted to between $16,000 and $17,000 after the new goods were added. Within a very few days after these goods had been placed in his stock he sold out the entire store, including everything, to the plaintiffs in this action for $6,000. They took an invoice at this time which, they claim, showed that the goods invoiced something over $12,000. Cannon paid a confidential debt to his mother, hired attorneys in advance and paid them $500 in cash out of our money for advice, preferred some of his pet creditors for about half of the money, and, as no other account is given of the balance, presumably converted it to his own use. He sold out these goods to Collins & Bretch intending not to pay E. H. Van Ingen & Co., which firm he had defrauded out of a large amount of new goods. The plaintiffs in this action claim to have purchased these goods from Cannon, and admit that they knew he was indebted several thousand dollars to his bank in Newton. The trade was worked up by one C. R. McLain, who was cashier of the Newton National Bank. McLain had previously had several transactions of this kind with the plaintiffs in this action, Collins & Bretch. He had sold out a stock of boots and shoes a short time before to the plaintiffs in this

action. Nothing whatever was said about the proposed transfer, and the invoice was taken after night. The scheme was consummated in the back room of the Newton National Bank, and the whole amount of the purchase money, $6,000, was paid by Collins & Bretch before any invoice whatever had taken place. Collins & Bretch had never had any experience whatever in men's furnishing goods and piece tailoring goods, hats and caps, of which this stock consisted; and, knowing that Cannon required the money paid before the invoice was taken, and that he wanted the invoice made after night, and that he was in debt several thousand dollars to the bank, blindly closed their eyes and made no inquiries whatever as to his intentions in making this sale of about $17,000 worth of goods for $6,000. The plaintiffs in the action in the State court alleged in their petition a wrongful conversion by the defendants as individuals. The petition did not allege the official capacity of the defendants, and did not in any way attempt to make out a case arising under the laws of the United States.

This is a very brief statement of a portion of the evidence on this branch of the case. After this sale took place many of the creditors brought attachments and levied them upon the stock. E. H. Van Ingen & Co. brought the first attachment in the United States Circuit Court for the District of Kansas, and levied upon a portion of the goods. The balance was levied upon with writs of attachment by the other creditors in the State court. It was for the taking of these goods by the United States deputy marshals that the defendants in this action were sued by the plaintiffs. The defendants, in their answer, justified the taking

under the writ of attachment at the suit of E. H. Van Ingen & Co., and, after the removal of the case to the Circuit Court of the United States for the District of Kansas, a trial was had by which the plaintiffs recovered judgment against the defendants at the June term, A. D. 1891. This judgment was reversed by the United States Circuit Court of Appeals for the Eighth Circuit (Walker et al. vs. Collins et al., 50 Fed. Rep., 737; S. C., 1 C. C. A., 642; S. C., 4 U. S. App., 406). After the case was remanded to the Circuit Court another trial was had, at the November term, 1892, which again resulted in judgment for the plaintiffs and against the defendants. This judgment was affirmed by the judgment of the Circuit Court of Appeals for the Eighth Circuit at the December term, A. D. 1893 (Walker et al. vs. Collins et al., 59 Fed. Rep., 70; S. C., 8 C. C. A., 1; S. C., 19 U. S. App., 307). It is to reverse this judgment of the Circuit Court of Appeals affirming the last judgment of the Circuit Court and to reverse the judgment of the Circuit Court itself that the present writ of error is brought. The Circuit Court retained jurisdiction of the cause when it should have remanded the case to the State court. The Circuit Court at the trial allowed testimony to go to the jury over the objection and exception of the defendants, which was incompetent; rejected evidence offered by the defendants which was competent; refused requests for instructions offered by defendants which should have been given, and gave instructions to the jury, over the objection and exception of the defendants which it was error so to give.

SPECIFICATION OF ERRORS.

I.

The Circuit Court erred in retaining jurisdiction of said cause and in not remanding it to the State court from which it was removed. And the Circuit Court of Appeals erred in not reversing the judgment of the Circuit Court for want of jurisdiction.

II.

The Circuit Court erred in admitting in evidence the deposition of E. Collins, one of the plaintiffs, when the same had not been on file at least one day before the day of trial. And the Circuit Court of Appeals erred in refusing to sustain this specification of error and in refusing to reverse the judgment of the Circuit Court on account thereof.

III.

The Circuit Court erred in excluding "Exhibit 4," which the defendants offered in evidence, and which was the copy of an affidavit in replevin, signed and sworn to by E. Collins, one of the plaintiffs, and filed by him in an action of replevin in the District Court of Harvey County, Kansas, in which, among other things, he affirmed and testified that the goods which he replevied in that case, and which were the balance of the Cannon stock left after the marshal had carried away the goods in controversy in this case, were worth $6,000. And the Circuit Court of Appeals erred in refusing to sustain this specification of error

and in refusing to reverse the judgment of the Circuit Court on account thereof.

IV.

W. H. Bretch, one of the plaintiffs in the action, testified in his own behalf that the balance of the goods in the stock which the defendants did not take had been levied upon by the sheriff of Harvey County, Kansas, that the plaintiffs replevied the same from the sheriff and closed them out at retail. He was then allowed to and did testify, over the objection and the exception of the defendants, that he realized out of the said stock which he so retailed about $5,700 or $5,800. He testified that he took about eight months to close them out; that they had purchased new goods and mixed them with the old goods; that they had paid expenses in the way of rent and other expenses, and that his time and his partner's time were worth each $100 a month in closing out said stock, and that they were employed about eight months in doing so; that they devoted all their time during the eight months to closing out said stock and did nothing else. And in the continuation of the same testimony the witness stated that they had made some profit on the new goods which they had mixed with the old. And the defendants specify that the admission of such testimony by the Circuit Court was error, and that the Circuit Court of Appeals erred in refusing to sustain this specification of error and in refusing to reverse the judgment of the Circuit Court on account thereof.

V.

The Circuit Court erred in refusing to instruct the jury as requested by the defendants in the following instruction, to wit:

"Tenth. The attachment affidavit, writ, return and other papers, and the judgment in the case of E. H. Van Ingen & Co. vs. Henry Cannon and introduced in evidence, are legal and regular in form and are sufficient to protect the marshal and justify him in levying on the goods in controversy, providing you find that Collins & Bretch had knowledge of fraudulent intent on the part of Cannon, or that they had sufficient notice to put a reasonable man upon inquiry in regard to such intention of Cannon to defraud his creditors."

And the Circuit Court of Appeals erred in refusing to sustain this specification of error and in refusing to reverse the judgment of the Circuit Court on account thereof.

VI.

The Circuit Court erred in giving the following instruction to the jury, to-wit:

"Fifth. Parties to a business transaction are not presumed, however, to deal with each other in bad faith, but, on the contrary, are presumed to deal honestly and in good faith until the opposite is shown by the evidence upon the trial; and anyone who alleges that such acts are done in bad faith of for a dishonest and fraudulent purpose takes upon himself the burden of showing that such is the case. In other words, fraud is never presumed, and it devolves upon him

who alleges fraud to show the same by satisfactory proof, i. e., proof to the satisfaction of the jury."

To the giving of which defendants duly excepted at the time. And the Circuit Court of Appeals erred in refusing to sustain this specification of error and in refusing to reverse the judgment of the Circuit Court on account thereof.

VII.

The Circuit Court erred in giving the following instruction to the jury, to-wit:

"Sixth. Fraud may be shown, however, by circumstances, but the circumstances must be of such a character and so connected with the transaction in question as to lead the mind naturally to infer that the alleged fraud has been perpetrated by the parties to the transaction."

To the giving of which the defendants duly excepted at the time. And the Circuit Court of Appeals erred in refusing to sustain this specification of error and in refusing to reverse the judgment of the Circuit Court on account thereof.

VIII.

The Circuit Court erred in giving the following instruction to the jury, to-wit:

"Eighth. The inadequacy or insufficiency of the price paid when a sale takes place will be considered by you in determining the good faith of the parties. An inadequate price, however, if you should find that an inadequate price was paid in this case, is not necessarily decisive, but is simply to be viewed as a circumstance, when it exists, of greater or less weight,

according as the inadequacy may be great or small. The mere fact that a sale of merchandise was not made in the usual and ordinary course of business will not necessarily invalidate the sale, but you should weigh this as a circumstance in determining the good faith of the parties, if you find that the sale in question was an unusual one, or not made in the ordinary manner."

To the giving of which defendants duly excepted at the time. And the Circuit Court of Appeals erred in refusing to sustain this specification of error and in refusing to reverse the judgment of the Circuit Court on account thereof.

IX.

The Circuit Court erred in giving the following instruction to the jury, to-wit:

"Tenth. In determining whether the sale in question in this case was made in good faith or for the purpose of defeating Cannon's creditors, you should take into account the intentions and motives of both parties to the sale; that is, the purposes and intentions of Collins and Bretch and Cannon. If you should be satisfied, from the evidence in the case, that it has been shown that in making the sale to the plaintiffs Cannon intended to defraud his creditors, yet if, on the other hand, you should find that the plaintiffs had no intention of participating in the fraud or to aid-or assist Cannon in carrying out such fraud, in such case you should find for the plaintiffs. In other words, to render this sale void as to creditors, both seller and buyer must have acted in bad faith; and if the plaintiffs bought from Cannon in good faith they took a

good title, whatever may have been Cannon's intention in effecting the sale."

To the giving of which the defendants duly excepted at the time. And the Circuit Court of Appeals erred in refusing to sustain this specification of error and in refusing to reverse the judgment of the Circuit Court on account thereof.

X.

The Circuit Court erred in overruling the defendants' motion for a new trial and in rendering judgment in favor of the plaintiffs and against the defendants. And the Circuit Court of Appeals erred in refusing to sustain this specification of error and in refusing to reverse the judgment of the Circuit Court on account thereof.

ARGUMENT.

As the jurisdiction of the Circuit Court of the United States for the District of Kansas over this case did not depend entirely, or even partly, upon the opposite parties to the suit being aliens and citizens of the United States or citizens of different States (printed record, pp. 11, 12), this court has jurisdiction to review the judgment of the Circuit Court of Appeals affirming the judgment of the Circuit Court under Section 6 of the act of March 3, 1891 (26 St., p. 826), the matter in controversy exceeding the sum and value of $1,000 besides costs.

N. Pac. R. R. Co. vs. Amato, 144 U. S., 465.
S. C., 12 Sup. Ct. Rep., 740.

We now proceed to a consideration of the specifications of error:

FIRST.

The judgment in this case should be reversed, for the reason that the Circuit Court for the District of Kansas had no jurisdiction of the cause. This suit was commenced by the plaintiffs in the State court against the defendants, and in their petition (printed record, pp. 5 and 6) they allege that the defendants wrongfully took possession of and converted to their own use a stock of merchandise of the value of $10,000, and prayed judgment for that amount against all of the defendants. The defendants, in their answer (printed record, pp. 8, 9, and 10), filed in the State court, admitted that two of the defendants, to-wit, Howard and Partridge, had taken and converted a portion of the goods mentioned and described in the plaintiffs' petition, but denied that the other two defendants, to-wit, Walker and McMurray, took any part in the taking and converting of any of the goods. The answer was a joint answer by all of the four defendants. It denied that all of the goods were converted, but admitted that a portion of the goods had been converted. The defendants justified the taking of a portion of the goods by Howard and Partridge under the writ of attachment issued out of the United States Circuit Court for the District of Kansas, in the suit of E. H. Van Ingen & Co. against H. Cannon, and alleged that they took said goods as the property of Cannon, and that the plaintiffs were claiming title thereto under a pretended transfer from Cannon, which was made for the purpose of hindering, delaying and defrauding the creditors of the said Cannon,

and that the plaintiffs had knowledge of such fraud.

Under the allegations of this answer the defense was not one arising under the laws of the United States as a whole. If the answer had admitted the taking and converting of all the goods alleged in the petition to have been taken and converted, and admitted such taking and conversion by all the defendants under the writ of attachment, this, then, would have constituted a defense arising under the laws of the United States. But as two of the defendants pleaded not guilty as to the taking and converting of any of the goods whatever, and as all of the defendants pleaded not guilty as to the taking and converting of a portion of the goods, it is, therefore, plain that this plea of not guilty by part of the defendants as to all the goods, and the plea of not guilty made by all the defendants as to a portion of the goods, did not constitute a justification under the writ of attachment to the full charge made by the plaintiffs; and consequently the defense as to these pleas of not guilty was not one arising under the laws of the United States, and the suit was, therefore, not removable to the Circuit Court. In order that a suit may be removed it is essential that the grounds of removal apply to all of the defendants jointly.

But even if the answer of the defendants did state a full justification as to all of them for the taking of all the goods alleged in the petition to have been taken, still the Circuit Court of the United States for the District of Kansas had no jurisdiction of the case. It is true that, under the removal act of 1875, such a full justification, under the writ of attachment by the

marshal and his deputies, would have constituted a ground for removal.

> Bock vs. Perkins, 139 U. S., 628; S. C., 11 Sup. Ct. Rep., 677.

This case just cited had been removed from the State court to the Circuit Court of the United States for the Northern District of Iowa under the removal act of 1875, and this court had frequently held that, under Section 2 of that act, it was only necessary, in order to constitute the right of removal, that the record at the time of removal should show that either party claimed a right under the Constitution or laws of the United States.

> R. R. Co. vs. Mississippi, 102 U. S., 135.
> Ames vs. Kansas, 111 U. S., 449, 462; 4 Sup. Ct. R., 437.
> Brown vs. Houston, 114 U. S., 622; 5 S. C. R., 1091.
> Society vs. Ford, 114 U. S., 635, 642; 5 S. C. R., 1104.
> Pac. R. R. Rmvl Cases, 115 U. S., 1; 5 S. C. R., 1113.
> Tenn. vs. Whitworth, 117 U. S., 129, 139; 6 S. C. R., 645.
> S. Pac. R. R. vs. California, 118 U. S., 109; 6 S. C. R., 993.

But the case at bar was commenced on the 18th day of April, 1890, and the petition for removal was filed on the 10th day of May, 1890. It was therefore removed under said Section 2 as amended by the act of March 3, 1887, c. 373, as corrected by the act of

August 13, 1888, c. 866 (25 Stat., 434). The plaintiffs, in their petition in the State court, did not allege the official character of the defendants and alleged no fact whatever which, in the slightest degree, tended to show that the case was one arising under the laws of the United States. Section 2 of the act of Congress of 1888 provides for the removal of only those cases over which the Circuit Courts of the United States have jurisdiction if commenced in such courts under Section 1 of the same act. The fact that the defendants, in their answer, justified the taking of the goods under the writ of attachment and alleged in their petition for removal that the case was one arising under the laws of the United States did not cure the want of such allegation in the plaintiffs' petition. Under the act of 1875 the criterion was, Did the suit or defense as made by the pleadings at the time of the application for removal show that either party claimed a right under the Constitution, laws or treaties of the United States? Under the act of 1888 the question is, Does the plaintiffs' petition, declaration, or bill show that the action or suit is one arising under the Constitution, laws or treaties of the United States? If it does not, the suit cannot be removed, notwithstanding that Federal questions may be raised by the defendants' answer, plea or petition for removal.

State of Tenn. vs. Union and Planters Bk., and

Same vs. Bank Commerce et al., 152 U. S., 454; S. C., 14 Sup. Ct. Rep., 654.

Chappell vs. Waterworth, 155 U. S., 102; S. C., 15 Sup. Ct. Rep., 34.

Postal Tel. Cable Co. vs. State Alabama, 155 U. S., 482; S. C., 15 Sup. Ct. Rep., 192.
Eastlake Land Co. vs. Brown, 155 U. S., 488; S. C., 15 Sup. Ct. Rep., 357.

The Circuit Court, then, should have remanded this cause to the State Court from which it was removed and should have sustained the motion made for that purpose; and the Circuit Court of Appeals should have reversed the judgment of the Circuit Court and remanded the case, with instructions to sustain the motion to remand to the State court. The fact that the question of jurisdiction might have been certified by the Circuit Court direct to this court is no obstacle to raising the question of jurisdiction in this court on a writ of error to the Circuit Court of Appeals. In Northern Pacific R. R. Co. vs. Amato, supra, it was decided that the party who takes to the Circuit Court of Appeals a case involving more than $1,000 and not belonging to any of the classes in which the judgment of that court is made "final" by Section 6 of the act creating it does not waive his right to a review of such judgment by the Supreme Court, even though he might have taken the case direct from the Circuit Court to the Supreme Court in the first instance. This is applicable to the present case.

It is true that the Circuit Court never passed upon the question of jurisdiction in this case, so far as the record shows, but it was bound to do so. It is a responsibility which the Circuit Court cannot escape, and it makes no difference as to which party first invoked the jurisdiction of the Circuit Court. This court is bound to consider the question of the jurisdic-

tion of the Circuit Court, raised even for the first time here by either party to the suit.

The case of Mansfield C. & L. M. Ry. et al. vs. Swan et. al., 111 U. S., 379 (4 S. C. R., 510), is a case which reviews all of the authorities upon these questions, from 1804 down to the time it was decided.

The judgment, then, should be reversed and the costs in the Circuit Court and in the Circuit Court of Appeals and in this court should be taxed against Collins & Bretch, as they were responsible for the case being removed from the State Court to the Circuit Court.

Torrence vs. Shedd, 144 U. S., 527; 12 S. C. R., 726.

Martin vs. Snyder, 148 U. S., 663; 13 S. C. R., 706.

It is true that the defendants in the State Court filed the petition for removal (printed Record pp. 11 and 12); but notwithstanding this, the plaintiffs in the State Court, Collins & Bretch, who are defendants in error here, themselves caused the removal of the case from the State Court to the Circuit Court. This we will show the Court by the record. The petition for removal was filed May 10, 1890 (printed Record pp. 11 and 12), and on about May 20 the petition and bond were presented to the State Court and it was then and there ordered that the petition for removal be overruled and denied. Afterwards, and on May 28, 1890, Bowman & Bucher, the attorneys for the plaintiffs, served upon Brown & Kline, the attorneys for the defendants in the State Court, a notice that they

would call up for reconsideration the Court's order and ruling on the petition and bond for removal. That notice, after stating the venue and title of the case, is as follows:

"To Brown & Kline, Attorneys for Defendants:

"You are hereby notified and informed that at some time to-day, in the afternoon, the plaintiffs will make an application to the Court for a reconsideration of the Court's order and ruling on the petition and bond for removal in the above entitled cause. This notice is given you so that if you desire to be present and heard in the matter you can do so.

"BOWMAN & BUCHER,
"Attorneys for Plaintiffs.

"Dated May 28, 1890.

"We hereby accept service this 28th day of May, 1890. BROWN & KLINE.

"Endorsed as follows:

"4159, Collins & Bretch vs. R. L. Walker et al. Notice. Filed May 29, 1890: W. J. Puett, Clerk District Court. (See printed record, pp. 13 and 14.)"

And on May 28, 1890, in pursuance of the notice so given, the attorneys for both parties were present in court for the reconsideration of said petition for removal. The attorneys for the plaintiffs announced to the Court that they had come to the conclusion that the case was removable and they desired the Court to reconsider the order before made denying the petition for removal and make an order removing the case to the Circuit Court of the United States. The attorneys for the defendants then announced that they would

waive their rights under said petition and desired to withdraw the same and objected to any order of removal being made. The attorneys for the plaintiffs then announced that the jurisdiction of the Federal Court had already attached and that there was nothing to do but for the Court to remove the case. The State Court ruled that the jurisdiction of the Federal Court had attached and that it would make the order removing the case thereto. The attorneys for the defendants still objected, and as the clerk had not yet written up the order denying the petition for removal which had theretofore been made, the attorneys for the defendants asked that such order be written up and that an order be entered on the 28th, the time at which said reconsideration took place, showing that the plaintiffs' attorneys had asked the Court to reconsider the petition and had asked the Court to remove the case to the Circuit Court and that the defendants had waived their rights under the petition for removal and asked leave to withdraw the same, and objected to the case being removed. This the Court refused to do. The Court refused to have the order denying the petition written up at all, refused to allow an entry on the 28th to show that the case was removed on the application of the plaintiffs' attorneys or that the defendants had waived their rights under the petition for removal and had stated that they would withdraw the same, and refused to allow the entry to show that the defendants had objected to the removal, but ruled that the entry should simply show that the question was reconsidered and that the case was removed. Then, turning to the defendants' attorneys, the Court said: "Mr. Brown, the

most I will do is to allow this entry to show that the plaintiffs interposed no objection to the removal. I will not allow it to show that it was removed upon their application, although it is correct."

Now, the record contains ample proof that what we have stated as to what took place is the exact truth as to those matters. The record does not contain the order denying the petition for removal, but it does contain the order entered by the Court on the 28th of May, the time the matter was reconsidered. That order is found on page 14 of the printed record in this court and is as follows:

"In the District Court of Harvey County, Kansas:

"E. Collins and W. H. Bretch, Partners as Collins & Bretch,
Plaintiffs,
vs.
"R. L. Walker, Charles Howard, James McMurray, and A. J. Partridge,
Defendants.
No. 4159.

"And now, on this 28th day of May, 1890, this cause came on for further hearing upon the petition and bond for removal heretofore filed herein by the defendants for the removal of this cause to the Circuit Court of the United States for the District of Kansas; and the plaintiffs, present by their attorneys, Bowman & Bucher, and the defendants present by their attorneys, Brown & Kline; and upon a further hearing and consideration the order heretofore made by the Court overruling the said application and petition for removal is hereby rescinded, vacated and set

aside, and said application and petition for removal is hereby allowed by the Court, the plaintiffs interposing no objection thereto."

Now, the notice which was copied above, served on the defendants' attorneys by the plaintiffs' attorneys, recites that the plaintiffs' attorneys will make an application to the Court for a reconsideration of the Court's order and ruling on the petition and bond for removal. While the record does not contain the order denying the petition for removal, this recitation in this notice shows that the Court had passed upon the matter; and the entry on the 28th of May, above copied, shows that the order made by the Court "overruling said application and petition for removal is hereby rescinded, vacated and set aside." This, then, is conclusive proof from the record itself that the Court had made an order denying the petition for removal, and the notice above copied is conclusive proof that the matter was reconsidered upon the application of the plaintiffs. And the order of the 28th shows on its face that the plaintiffs interposed no objection thereto. Now, of course, the defendants are bound by the record, and for this very reason the plaintiffs themselves are bound by the record, and this record shows that the Court had denied the defendants' petition for removal and afterwards, on the application of the plaintiffs, vacated and set aside that order and removed the case to the Circuit Court. The notice recites that the plaintiffs themselves would make application for a reconsideration, and the order shows that the petition had been denied. From this record the conclusion is therefore irresistible that the

plaintiffs are responsible for the case being brought to the Circuit Court of the United States for the District of Kansas and should therefore be taxed with the costs made in that court, and in the Circuit Court of Appeals, and in this court.

The record further shows (printed Record, p. 15) that the plaintiffs made a motion to remand after the case had been filed in the Circuit Court, but it nowhere shows, from beginning to end, that they ever pressed that motion to a determination. The fact is that they never did press it to a hearing and the Circuit Court never passed upon the question of jurisdiction or on the plaintiffs' motion to remand the case. They are therefore responsible for the case not being remanded, as they were responsible for its being removed in the first place. The Circuit Court therefore being without jurisdiction of this case, and the plaintiffs being responsible for the case being in that court, this court should reverse the judgment, both of the Circuit Court of Appeals and of the Circuit Court, and remand the case, with directions that it be remanded to the State Court, and that the costs in all three of the Federal Courts be taxed against the defendants in error.

SECOND.

The second error of which we complain is the ruling of the trial court admitting the deposition of the plaintiff, E. Collins, in evidence. We objected to the introduction of this deposition in evidence on the ground that it had not been on file at least one day before the day of trial. It seems very clear to us that

this objection should have been sustained and the deposition excluded. The statutes of Kansas in force at the time of the trial of this case, concerning the admission of depositions in evidence and the time of filing them, provides:

(4456) Filing Depositions. Sec. 361. "Every deposition intended to be read in evidence on the trial must be filed at least one day before the day of trial."

Gen. Stat. Kan., 1889, Par. 4456 Code Civil Procedure, Sec. 361.

The deposition of the plaintiff Collins which we objected to was filed on the 29th day of November, 1892, and the trial commenced on the 30th day of November, 1892. (Record, p. 22.)

We take it that there can be no question but that the Court should have been governed by this provision of the Kansas Code in the determination of the question. We called the Court's attention to it and insisted upon our rights to have the deposition excluded. The Court should have taken judicial notice of this provision of the State law.

Course vs. Stead, 4 Dall., 22.
Owings vs. Hull, 9 Pet., 607.
Junction R. R. vs. Bank Ashland, 12 Wall., 266.
Elwood vs. Flannigan, 104 U. S., 562.
Lemar vs. Micou, 114 U. S., 218.

The acts of Congress have made the state laws rules of decisions in trials at common law, and provide:

"The laws of the several states, except where the

constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

Rev. Stats., Sec. 721.

And again:

"The practice, pleadings, and forms and modes of "proceeding in civil causes, other than equity and "admiralty causes, in the Circuit and District Courts, "shall conform as near as may be to the practice, "pleadings, and forms and modes of proceeding ex- "isting at the time in like causes in the courts of "record of the state within which said Circuit or Dis- "trict Courts are held, any rule of the Court to the "contrary notwithstanding."

Rev. Stats., Sec. 914.

Now, Section 361 of the Kansas Code should have governed in this case under either of the sections above quoted. It was certainly "practice" and "forms and mode of proceeding." And it was also a rule of evidence, and the trial court should have sustained the objection.

McNeil vs. Holbrook, 12 Pet., 84.
Vance vs. Campbell, 1 Black, 427.
Haussknecht vs. Claypool, 1 Black, 431.
Wright vs. Bales, 2 Black, 535.
Sims vs. Hundley, 6 How., 1.
Ryan vs. Brindley, 1 Wall., 66.
Conn. Mut. L. Ins. Co. vs. Union Trust Co. of N. Y., 112 U. S., 250.
S. C. Sup. Ct. Rep., 119.

These cases all hold that the rules of evidence prescribed by the laws of the State are "rules and decisions" for the United States Courts while sitting within the limits of such State. Therefore the State provisions concerning the filing of depositions is the rule by which the trial Court should have been governed.

In Wright vs. Bales, above cited, the Court said: "We do not perceive any sufficient reason for so con-"struing this Act of Congress (34th Sec. Judc. Act; "same as Sec. 721 Rev. Stat.) as to exclude from its "provisions those statutes of the several States which "prescribe rules of evidence in civil cases in trials at "common law."

And again, in Conn. Mut. Life Ins. Co. vs. Union Trust Co.: "By Sec. 721 of the Revised Statutes, which "is a reproduction of the 34th Section of the Judiciary "Act of 1789, it is declared that 'the laws of the sev-" 'eral States, except where the constitution, treaties, " 'or statutes of the United States otherwise require " 'or provide, shall be regarded as rules of decision " 'in trials at common law, in the courts of the United " 'States where they apply.' This has been uniformly "construed as requiring the Courts of the Union in "the trial of all civil causes at common law, not within "the exceptions named, to observe, as rules of decision, "the rules of evidence prescribed by the laws of the "States in which such Courts are held."

Then, after citing nearly all of the cases given above upon this proposition, the Court continues:

"There is no ground for the suggestion that Secs. "721, 858, and 914 of the Revised Statutes may be con-"strued as relating to the competency of witnesses

"rather than to the nature and principles of evidence.
"While in some of the cases the question was whether
"a witness, competent under the laws of the State,
"was not, for that reason, under the 34th Section of the
"Act of 1789, a competent witness in the Courts of
"the United States sitting within the same State; in
"others the question had reference to the intrinsic
"nature of the evidence introduced. In McNeil vs.
"Holbrook the Court held the Courts of the United
"States sitting in Georgia to be bound by a statute
"of that State declaring, as a rule of evidence, that
"in all cases brought by an endorser or assignor, or
"on any bill, bond, or note, the assignment or endorse-
"ment, without regard to its form, should be sufficient
"evidence of the transfer thereof; the bond, bill, or
"note to be admitted as evidence without the neces-
"sity of proving the handwriting of the assignor or
"endorser. And in Sims vs. Hundley a notary's cer-
"tificate, held to be inadmissible as evidence under the
"principles of general law, was admitted upon the
"ground that having been made competent by Statute
"of Mississippi it was competent evidence in the Cir-
"cuit Court of the United States sitting in that State.
"We perceive nothing in the other sections of the Re-
"vised Statutes to which attention is called, that modi-
"fies Sec. 721, except that by Sec. 858 the Courts of
"the United States, whatever may be the local law,
"must be guided by the rule that, 'No witness shall
" 'be excluded in any action on account of color, or
" 'in any civil action because he is a party to or inter-
" 'ested in the issue tried;' and by the further rule that
" 'in actions by or against executors, administrators,
" 'or guardians in which judgment may be rendered

" 'for or against them, neither party shall be allowed
" 'to testify against the other as to any transaction
" 'with, or statement by, the testator, intestate, or
" 'ward unless called to testify thereto by the opposite
" 'party, or required to testify by the Court.' 'In all
" 'other respects,' the section proceeds, 'the laws of
" the State in which the Court is held shall be the
" 'rules of decision as to the competency of witnesses
" 'in the Courts of the United States in trials at com-
" 'mon law and in equity and admiralty.' As to Sec.
"914 it is sufficient to say that it does not modify
"Sec. 721 in so far as the latter makes it the duty of
"the Courts of the United States in trials at common
"law to enforce—except where the laws of the United
"States otherwise provide—the rules of evidence pre-
"scribed by the laws of the States in which they sit.
"For these reasons, it is clear that the Circuit Court
"properly refused to permit physicians called as wit-
"nesses to disclose information acquired by them
"while in professional attendance upon the insured
"and which was necessary to enable them to act in
"that capacity."

So we see in all these cases the Court from the earliest time in construing the Judiciary Act, and in the later cases in construing Sec. 721 of the Revised Statutes and also Sec. 914, have repeatedly held that the Federal Courts are governed by the laws of the States prescribing rules of evidence in common law causes. In the last case above quoted from, that of the Conn. Mut. Life Ins. Co. vs. The Union Trust Co., the Circuit Court for the Southern District of New York was justified in holding that physicians could

not testify by disclosing information acquired by them while in professional attendance upon the insured and which was necessary to enable them to act in that capacity on account of Sec. 834 of the Code of Civil Procedure of New York prohibiting such testimony. These cases not only hold that these sections include rules of evidence, but in the very language of the Statutes include "rules of decision," "practice," and "forms and modes of proceeding."

It seems to us that there is no possible theory upon which it can be contended that this provision of the Kansas Code does not govern this question. The mere fact that Congress has provided a mode of taking and transmitting depositions cannot be held to cover the question at issue here. Congress merely provides the manner of taking and transmitting. After the deposition is filed it is then governed by the rules of decision, which includes rules of evidence, and by the practice and form and mode of proceeding as prescribed by the State law, for there is no provision whatever in the Federal Statutes concerning the question here. Of course we are well aware that if Congress had provided how long a depostion should be on file prior to the day of trial before it could be read in evidence, this of course would shut out the operation of the State Statute. But Congress has made no such provision; in fact, the Acts of Congress providing for the taking and transmitting of depositions do not exclude the operation of the State Statutes upon the same subject. In the eighth circuit it has always been the rule that parties could take depositions either under the Acts of Congress or under the Statutes of the

State, at their election. As early as 1879, Justice Miller, while holding the Circuit Court for the District of Kansas, made the following decision: "The motion "to suppress must be denied. In common law actions "in the Federal Courts, where, under the provisions of "the Act of Congress a case arises in which testimony "may be taken by deposition, the parties may follow, "in respect to the manner of taking them either the "provisions of the State Law or of the Act of Congress, "as they may elect. Since the notice and certificate in "this case conform to the provisions of the State "Statute, I hold that the depositions may be read in "evidence. Such has been the practice so far as I "know in the Circuit Court from the earliest period. "Prior to the Act of 1872 (Rev. Stat. Sec. 914), it is prob- "able that the practice may have rested upon rules of "Court adopting the State regulations as to taking and "certifying depositions; but that act is broad enough "to sanction the practice where the local regulations "do not conflict with any special provision of the "Acts of Congress on the subject."

Flint vs. Board County Commissioners of the County of Crawford, 5 Dill., 481.

Now we see by this decision that Justice Miller holds that the laws of the State have as much force concerning the taking of depositions as the Acts of Congress in the practice in the Federal Courts, and this decision by Justice Miller was rendered in the Eighth Circuit and also in the District of Kansas, where the case at bar was tried. It seems to us that this certainly concludes the question beyond doubt. But the matter has also been further settled by the

action of the Legislative department of the Government itself. Congress has enacted that the laws of the several States concerning the taking of depositions shall be applicable to causes pending in the District and Circuit Courts of the United States. That Act provides: "That in addition to the mode of tak-"ing depositions of witnesses in causes pending at law "or equity in the District or Circuit Courts of the "United States it shall be lawful to take the deposi-"tions or testimony of witnesses in the mode prescrib-"ed by the laws of the State in which the Courts are "held."

Act of Congress, March 9, 1892.

So we see that not only has it been held that these Acts of Congress concerning the taking of depositions do not exclude the operation of the laws of the States upon the same subject, but that Congress itself has so provided.

But the deposition was admitted and our objection thereto was overruled on the further ground that it had been on file one day before the day of trial. Here the Court undoubtedly was in error. The deposition was filed November 29th, and the trial was commenced November 30th. This, as we construe the Statutes of Kansas, is not one day before the day of trial. It has been so held by the Supreme Court of the State in construing this very section. Chief Justice Horton in delivering the Opinion of the Court in the case, said: "It is assigned as error that the depo-"sition of a material witness on the part of the de-"fendant in error was read upon the trial against the "objection of the plaintiff in error in violation of Sec.

"361 of the Civil Code, which provides that 'every "'deposition intended to be read in evidence on the "'trial must be filed at least one day before the day "'of trial.' The trial of the case commenced at 9 "o'clock a. m., of November 12, 1875, and the deposi- "tion was filed in Court at 11 o'clock a. m. of the 11th "day of November. This assignment of error must be "sustained, because the Statute requiring at least one "day before the day of trial, means one clear day; and "both the day on which the deposition was filed and "the day of the trial must be excluded. With this con- "struction the deposition ought not to have been "read."

Garvin vs. Jennerson, 20 Kan., 371.

This ought to be conclusive. The Court should have been governed by this construction placed upon this section of the State Code by the highest Court in that State. This decision was rendered in 1878 and has been the rule in that State ever since.

Decisions of State Courts on the construction of their own constitutions and statutes, if settled by the highest court of the State, are binding on the courts of the United States.

Luther vs. Borden, 7 How., 1.
Nesmith vs. Sheldon, 7 How., 812.
Webster vs. Cooper, 14 How., 488.
Gelpcke vs. Dubuque, 1 Wall., 175.
Randall vs. Brigham, 7 Wall., 523.
Township of Elmwood vs. Macey, 92 U. S., 289.
Town of S. Ottawa vs. Perkins, 94 U. S., 260.

Fairfield vs. Gallatin County, 100 U. S., 47.
Post vs. Supervisors, 105 U. S., 667.
Louisville, etc., R. R. Co., vs. Mississippi, 133 U. S., 587.
Gromley vs. Clark, 134 U. S., 338.
Union Bank vs. Kansas City Bank, 136 U. S., 223.
Norton vs. Shelby Co., 118 U. S., 425.
Bucher vs. Cheshire R. R. Co., 125 U. S., 555.
Amy vs. Watertown, 130 U. S., 301.
In re Duncan, 139 U. S., 449.
Leeper vs. Texas, 139 U. S., 462.

The interpretation within a State of a local law becomes a part of that law as much as if incorporated in it by the Legislature.

Christy vs. Pridgeon, 4 Wall., 196.

But it is insisted that under the Kansas Code we should have put our objections to this deposition in writing or filed a motion to suppress. We do not understand that this is at all necessary; in fact, it would be highly improper on an occasion of this kind. There was nothing irregular about this deposition itself. We waived all other objections and exceptions to the deposition, and the Court, if we had made any written exceptions to it before the trial or should have moved the Court to suppress the deposition, our exceptions and motions should certainly have been overruled. The Court before the commencement of the trial could not determine whether the objection which we raised was good or not. If the trial had commenced on the day after it did commence, our objection would not

have been good. So it is clearly not necessary to make any written motion to suppress or file any written objections to a deposition on the ground that it has not been on file at least one day before the day of trial. The statute provides that "every deposition intended "to be read in evidence on the trial must be filed at "least one day before the day of trial." This was our objection to the deposition being read. We did not know that the deposition would be offered in evidence at this trial. In fact, according to this provision of the Code we had a right to presume that it would not be offered in evidence, if the trial commenced on the day after it was filed, for, as will be seen, the language is, "Every deposition intended to be read, etc." Again, we were not bound to look for this deposition, and the fact is we did not know it was on file until it was offered in evidence. It is very clear that the proper way to raise the objection which we raised, is simply to object to its being read when offered, if it has not been filed at least one day before the day of trial. In the case of Garvin vs. Jennerson, supra, there was no motion to suppress nor any written exceptions filed. The Chief Justice stated the matter as follows: "It is "assigned as error that the deposition of a material "witness on the part of the defendant in error was "read upon the trial against the objection of plaintiff "in error in violation of, etc." So we see that the mode of raising the question was simply to object to its being read, and as the Court would not be justified in suppressing the deposition before the trial it certainly seems to us that our objection was raised in the proper manner.

This deposition was read in evidence and it is pre-

sumed from the commission of this error that the error was prejudicial It has been held by this Court that it is not necessary that the bill of exceptions should show the materiality of the testimony objected to. The Court said:

"The facts which this witness offered to prove are "not stated in the bill of exceptions. We cannot, "therefore, disregard the exception upon the idea that "the testimony could not have been material, or "could not have changed the result of the verdict."

Vance vs. Campbell, 1 Black, 427.
Haussknecht vs. Claypool, 1 Black, 431.

And in a later case it was decided that any error appearing from the record entitles a party to a new trial unless it is perfectly clear that he could not have been prejudiced thereby. The Court say: "But it was said "by the Supreme Court of Montana on appeal that "since the record did not contain all the testimony, "the Court could not see that defendants were injured "by the refusal to have the questions answered. We "have not before heard of such a rule in a revisory "court. The farthest any Court has gone has been "to hold that when such Court can see affirmatively "that the error worked no injury to the party appeal-"ing it will be disregarded. This Court in Deery vs. "Croy, 5 Wall., 807, used this language: 'That wher-" 'ever the application of this rule is sought, it must " 'appear so clear as to be beyond doubt that the error

"'did not and could not have prejudiced the parties' "'rights."

Gilmer vs. Higley, 110 U. S., 47.
S. C., 3 Sup. Ct. Rep., 471.

So it must be presumed in this case that this error in admitting the testimony of Collins was material. But further, the bill of exceptions itself provides that it "correctly and truly states that part of the proceed-"ings and evidence which are necessary to a full un-"derstanding of each and every ruling mentioned and "excepted to herein." (Record, p. 40.)

For all of these reasons, then, the Court certainly committed material error in overruling our objection to the reading of this deposition.

THIRD.

The Court erred in excluding Exhibit No. 4, which the defendants offered in evidence. This was a copy of an affidavit made by E. Collins, one of the plaintiffs, and filed by him in the case of Collins and Bretch vs. E. E. Pollard et al., in the District Court of Harvey County, Kansas; and which action was known as the replevin action, in which the plaintiffs in this action recovered the balance of the goods left after the marshal had levied on the goods in controversy in this case. The plaintiffs objected to the introduction of Exhibit No. 4 because it was not the best evidence. Now, we think that this objection was not tenable. This copy of the affidavit marked Exhibit 4 should have repelled this objection on either of two grounds: first it was a sworn copy; and, second, the absence of

the original was sufficiently accounted for to enable the defendants to introduce secondary evidence of its contents.

Sworn copies of records and judicial proceedings are competent to prove the contents thereof.

Greenleaf on Evidence, Sec. 91.
2 Philipps on Evidence, 10 Eng. Ed., 353.
Cowen & Hills, notes to 5th Amer. Ed., 295.
Owings vs. Hull, 9 Pet. 607. See Opin. 626.
Church vs. Hubbart, 2 Cranch, p. 238 of Opin.
Gaines vs. Relf, 12 How., 472.

This has been the rule of the American and English decisions from the earliest times. The witness, W. E. Brown, testified on the hearing of this case that he was counsel for the defendants and had been ever since the suit was instituted; that he knew what Exhibit 4 was; that it was a true, correct, full and complete copy to his certain knowledge of an affidavit in replevin made and filed in the District Court of Harvey County, Kansas, in the case of Collins & Bretch vs. E. E. Pollard et al.; that such original affidavit was signed by the plaintiff, E. Collins; that he knew Mr. Collins' handwriting and knew that he signed the original, and that it, the original, was sworn to before the District Clerk of Harvey County, Kansas; that Mr. Collins, one of the plaintiffs, had stated to witness that he had signed and sworn to the original affidavit; that said original affidavit was made and filed in the same replevin suit in which plaintiffs in this action replevied the balance of the goods after the marshal had levied on and carried away those in controversy in this case and being the

balance of the goods which the sheriff of Harvey County had levied upon. (Record, p. 26.) The witness, Charles Bucher, testified that he was the attorney for the plaintiffs; that Exhibit 4 was found in the printed record of this case of a former appeal or proceeding in error in the Circuit Court of Appeals; that he was not sure that Exhibit 4 was a copy of said replevin affidavit; that he had not compared it, but that he presumed it was a copy of the affidavit. (Record p. 26.)

Now here was positive and direct testimony on the trial of this case that Exhibit 4 was to the certain knowledge of the witness, W. E. Brown, a true, full, complete and correct copy of said original affidavit.

This rendered this Exhibit 4 competent even if the original had been on file and in the hands of the clerk of the District Court. The authorities cited above show that this is one way, besides others, of proving a record. Mr. Greenleaf, in his work on Evidence, says:

"The rule rejecting secondary evidence is subject to "some exceptions, grounded either on public convenience or on the nature of the facts to be proved. Thus "the contents of any record of a judicial court and all "entries in any other public books or registers may be "proved by an examined copy. This exception extends to all records and entries of a public nature in "books required by law to be kept, and is admitted "because of the inconvenience to the public which the "removal of such documents might occasion, especially if they were wanted in two places at the same "time; and also because of the public character of the

"facts they contain and the consequent facility of de-
"tection of any fraud or error in the copy."

1 Greenleaf, Sec. 91.

And again at Sec. 501, in enumerating the modes of proving records, he says:

"As to the proofs of records, this is done either by "mere production of the records without more, or by "copy. Copies of records are (1) exemplification; (2) "copies made by an authorized officer; (3) sworn "copies."

In Church vs. Hubbart, supra, at page 238 of the opinion, this Court said:

"Foreign judgments are authenticated, [1] by ex-
"emplifications under the great seal; [2] by a copy "proved to be a true copy; [3] by the certificate of an "officer authorized by law, which certificate must of "itself be properly authenticated. These are the "usual and appear to be the most proper if not the "only modes of verifying foreign judgments."

And in Gaines vs. Relf, supra: "It is objected "that the record is not duly proved..... "..... The answer to this objection rests "on well settled principles. All that is required "in cases of this kind is to produce a sworn "copy of the record, the witnesses also proving that "it was taken at the proper office and produced by the "lawful keeper of the records. In Phillips on Evi-
"dence, by Cowan, will be found the cases in support "of this mode of proof."

And in Owings vs. Hull, supra, at page 626 of the opinion:

"The next objection is that the papers referred to "in the testimony of Martin Blache, purporting to be "letters testamentary granted by the Court of Pro- "bates of Louisiana to John K. West are not legal evi- "dence in the cause against the defendants. We are "of the opinion that the objection is unfounded and "was rightly overruled by the Circuit Court. Blache "swears that he is a clerk and register of the Court of "Probates; that the copy is a true copy of the original; "that he cannot send the original which is on file in "the Court of Probates. Under such circumstances "the copy is the best evidence which the nature of the "case admits of."

And in the same opinion it is held that the Circuit Court had properly overruled objections to certain records of the Parish Court, for the reason that they were properly authenticated by the clerk's seal and the judge's certificate, as required by the Act of Congress of the 26th of May, 1790.

This shows conclusively that the authorities regard this mode of proving judicial papers and records as still in force and as cumulative to the manner provided by Act of Congress.

This mode of proving records is of very general use in England and has always been. Mr. Phillips in his work on Evidence, 2 vol., p. 353, lays down the rule:

"The more usual way of proving the records of the "superior and inferior courts of this country is by "means of examined copies and office copies."

It has been frequently held that this mode of proof is not superseded by the Act of Congress providing how records of State Courts shall be authenticated.

The Act of Congress was passed as supplemental to the provision of the Constitution of the United States. That provision reads as follows:

"Full faith and credit shall be given in each State "to the public acts, records and judicial proceedings "of every other State. And the Congress may by gen- "eral laws prescribe the manner in which such acts, "records and proceedings shall be proved and the ef- "fect thereof."

Congress has provided for authenticating these records. And this is understood to be binding on the states to this extent, only, that the courts of each state are bound to receive in evidence copies of such records and proceedings authenticated in accordance with this Act of Congress. And it is undoubtedly correct to say that the Courts would be bound to receive such records notwithstanding any act of their own Legislature providing that they should not be so received. But this does not mean that the common law method of proving records is not still in force, and indeed, the Legislature of any State could provide additional methods of proving records which would be binding upon their courts. Mr. Greenleaf in his work on Evidence upon this subject says:

"It seems to be generally agreed that this method of "authentication, as in the case of public documents be- "fore mentioned, is not exclusive of any other which "the States may think proper to adopt."

1 Greenleaf on Evidence, Sec. 505.

The Acts of Congress of 1790 and 1804 concerning

the proof of said records are cumulative and do not change the common law.

Goodwin vs. Goodwin, 25 Geo., 203.
Kean vs. Rice, 12 S. & R., 203-208.
The State vs. Stade, 1 D., Chipm., 303.
Raynham vs. Canton, 3 Pick., 293.
Biddis vs. Janes, 6 Binn., 321.
Ex parte Povall, 3 Leigh's R., 816.
Pepoon vs. Jenkins, 2 Johns. Cas., 119.
Ellmore vs. Mills, 1 Hayw., 359.

To the same effect, see Cowan and Hill's notes to the 5 Amer. Ed. of Phillips on Evidence, 353, Note 2.

This then certainly establishes the rule that the common law mode of proving judicial records and proceedings by means of a sworn copy is still in force, both in the United States courts and in the State courts. No other conclusion could be drawn from the cases decided by this Court and cited above, where sworn copies were admitted in evidence.

The trial Court in the case at bar should then have overruled the plaintiff's objection to Exhibit 4 on the ground that it was not the best evidence for this reason alone, that it was a sworn copy.

This objection that it was not the best evidence should also have been repelled by the fact that we accounted for the non-production of the original and accounted for it in such a manner that secondary evidence should have been received as to the contents of said original affidavit. The witness, W. E. Brown, testified that he did not have the said original affidavit; that he did not know where it was unless it

was on file in the District Court of Harvey County, Kansas.

The witness, Charles Bucher, testified that he was attorney for the plaintiffs and that he was also the attorney for the said plaintiffs in the said replevin case in which the affidavit had been filed; that he had asked the Clerk of the District Court of Harvey County, Kansas, a few days before the trial for the papers in said replevin case and that the clerk had informed him that Brown & Kline had them. Witness also testified that he inquired of Mr. Kline and that Mr. Kline informed the witness that he, Kline, did not have them and that he did not know where they were.

Now, this was a sufficient foundation for the introduction of secondary evidence as to the contents of this affidavit, and the secondary evidence which was offered was certainly the best that could be offered and was certainly good, that is, it was a true copy of the original. We do not understand that when secondary evidence is offered as to the contents of an instrument or a record that the strictest proof in all cases is required to show why the original is not produced. This Court in relation to this question has said:

"Rules of evidence are adopted for practical pur-
"poses in the administration of justice and must be so
"applied as to promote the ends for which they are de-
"signed."

U. S. vs. Reyburn, 6 Pet., 352.

And again in Minor vs. Tillotson, 7 Pet., 99: "The
"document offered and rejected by the Court is to be

"considered as secondary evidence and there can be "no doubt that the plaintiff was bound to account for "the non-production of the original. This is a docu- "ment which the law does not presume to be in the "possession of the plaintiff. It is a grant under which "Wade Hampton claimed a small part of which only "was in question in this suit. The presumption of "law therefore is that the original deed was in the "possession of Wade Hampton and the plaintiff could "not be bound to search for it elsewhere; there being "no law in Louisiana requiring deeds to be recorded. "And it was proved as a matter of fact that it was once "in his possession; at what time, however, is not "stated; and the question is whether such search was "made for it as to justify the admission of secondary "evidence. The rules of evidence are adopted for prac- "tical purposes in the administration of justice and al- "though it is laid down in the books as a general rule "that the best evidence the nature of the case will "admit of must be given, yet it is not understood that "this rule requires the strongest possible assurance "of the matter in question. The extent to which the "rule is to be pushed in a case like the present is gov- "erned in some measure by circumstances. If any "suspicion hangs over the instrument, or that it is de- "signedly withheld, a more rigid inquiry should be "made into the reasons for its non-production. But "when there is no such suspicion all that ought to be "required is reasonable diligence to obtain the origi- "nal. Has that been shown in this case? The bill of "exception states that it was proved to have been in "the possession of Wade Hampton and that on appli- "cation to him by the plaintiff's attorney for it he

"gave him a bundle of papers saying they were all the "titles to his Houmas lands (the premises in question "being a part of that tract); but which bundle on ex- "amination did not contain the original deed in ques- "tion. There was no other place to which the law "pointed where search could be made; and nothing "more could be required unless it was necessary to "have the oath of Wade Hampton that the deed was "not in his possession. But this we do not think un- "der the circumstances of this case was necessary. "There do not appear any grounds for supposing the "deed was designedly withheld and the circumstances "under which the search was made were equivalent to "the witness's having had free access to all of Wade "Hampton's papers and proving that the deed could "not be found among them. * * * * * * * * * * * * * * * * * The case of Caufman vs. "Congregation of Cedar Spring, 6 Binney, 59, decided "in the Supreme Court of Pennsylvania, goes very far "to establish that it was not necessary to have the tes- "timony of Wade Hampton under the circumstances "of this case. * * * * * We think the proof of "the loss of the original deed was sufficient to let in "the secondary evidence."

So the judgment in this case was reversed for the error of the Court in rejecting this offer.

See also to the same effect concerning the loss of an ante-nuptial contract and the introduction of secondary evidence of its contents, De Lane et al. vs. Moore et al., 14 How., 262 of the Opinion.

These cases are then assuredly sufficient to show that it was not necessary to have the sworn testimony

of the clerk of the Court and Mr. Kline. The circumstances are such that there could be no intimation of a design to deceive or to attempt to defraud concerning this affidavit. The original had been introduced on the first trial of this case and it had been copied into the printed record in the Circuit Court of Appeals on the first appeal. Counsel did not have the original at the second trial and it was shown by the opposing counsel's testimony that he had inquired of the clerk and the clerk had stated he did not have it and that Brown & Kline had it. Mr. Kline stated to the counsel that he did not have it, and Mr. Brown testified on the trial of the case that he did not have it and did not know where it was. There was no intimation that it was not a true copy. Opposing counsel testified that he presumed it was a true copy. The trial judge had certified that it was a true copy in the bill of exceptions and the clerk of the Circuit Court of Appeals had it printed in the record. It seems to us that under the cases above cited this evidence is certainly sufficient in accounting for the non-production of the original.

The objection, therefore, that Exhibit 4 was not the best evidence should not have been entertained.

But the copy of the affidavit was also objected to as incompetent, irrelevant and immaterial. Now we think these objections also were not good. It was competent for the purpose of showing that the plaintiff Collins had made an admission that the balance of the goods left after the marshal had carried away a portion were worth $6,000. It was a sworn admission, which certainly was strong evidence to show to the

jury that the whole amount of the goods was worth more than $6,000, the amount paid therefor to Cannon, and tended to show that the purchase price was inadequate. But counsel will contend that we also introduced it for the purpose of showing that as the plaintiffs had received $6,000 worth of goods they could not recover of the defendants in this case, for they had received a value for all the money they had paid on the purchase.

And counsel contend that as we offered Exhibit 4 for a purpose which was incompetent that therefore we had no right to introduce it for another reason which was competent. Now, we think this argument of counsel is not sound.

Ruggles vs. Gatton, 50 Ill., 412.
C., R. I. & P. R. R. Co. vs. Clark, 108 Ill., 113.

The bill of exceptions states that it was offered in evidence for several purposes; for the purpose of showing that in the replevin suit the plaintiffs had recovered the goods left in the store in Newton; second, that these goods were worth $6,000; third, that as this was the full amount of the purchase price, therefore the plaintiffs had lost nothing by the defendants taking what they did; fourth, that as against the attaching creditors whom the defendants represented in the case the plaintiffs could not recover.

Now, we think that it was competent for each and all of these purposes, but most assuredly for the second. There can be no question that we had a right to show by this affidavit that one of the plaintiffs had admitted that the balance of the goods were worth $6,000. This tended to show, as we above stated, that

an inadequate price had been paid for these goods, and it should have been received in evidence for this purpose, notwithstanding it was offered for other purposes for which it might not have been competent. We therefore insist that the Court erred and materially erred in rejecting Exhibit 4.

FOURTH.

Under this head we objected to the plaintiffs showing that they had retailed out the balance of the goods and had bought new goods and mixed with them and had continued to do so for eight months, counting the value of their time and their other expenses, and by this means attempting to calculate what they had realized out of the balance of the Cannon stock. We think it was perfectly proper for them to show by witnesses what this stock was worth as rebutting our evidence that an inadequate price had been paid for the whole Cannon stock, but we do not think that it was competent to show the value of this stock by showing what they had realized out of it by retailing it out after mixing it with other goods and paying expenses of $300 or $400 a month during a period of eight months. A balance of a stock of this kind during such a length of time might be run at a great loss, especially if the clerks charge $200 a month for their services. It is competent to show what the goods were worth, but not competent to show what they were offered for or what they were sold for six or eight months afterward. It is true we raised this same question in the Circuit Court of Appeals on a former appeal of this case, but we do not understand that the

former judgment in that Court is final. If that Court had reversed the judgment and directed what judgment should be entered, then this judgment would have been final unless appealed from. But where the intermediate Court reversed the case generally and for further proceedings, then the judgment is not final, and it is not, therefore, res adjudicata, and is not the law of the case.

Henning vs. Eldridge, 33 N. E. Rep., 754.

FIFTH.

It was error to refuse our tenth request. It was the duty of the Court to examine the attachment papers and pronounce to the jury that they were regular and legal in form and that they were a protection to the officer if the plaintiffs bought of Cannon in bad faith or had sufficient notice to put a reasonable man upon inquiry. We did not copy the attachment papers in the bill of exceptions for the reason that counsel admitted at page 25 of the record that all the attachment papers were regular and legal in form. The Court knew this and knew the papers were regular and legal, and he should have instructed the jury according to our tenth request. In Thompson on Trials, we have:

"The rule is said to be that written instruments "should be construed and interpreted by the Court "upon inspection only."

1 Thompson on Trials, Sec. 1065.

The Supreme Court of Pennsylvania lays down the rule on this question thus:

"This is a matter of very great importance. The "security of property depends upon it, for there is no "appeal from the decision of the jury."

Dennison vs. Wertz, 7 Serg. R. (Pa.), 372-376.

Mr. Thompson, in Vol. 1, Sec. 1066, again says:

"It is exclusively the privilege of the Court to inter- "pret all written instruments and to determine the "materiality and force of each and all of the facts con- "tained in them."

And again in Sec. 1067:

"The obligation of the Court to expound the "meaning of written instruments to the jury and not "to submit such questions to them embraces every "species of writings; contracts, records, deeds, letters, "and all others."

And in Sec. 1070: "The Court is bound to interpret "all public records and construe them according to "their meaning and intent, and state the result to the "jury."

And in Section 1071: "The meaning of a judicial "record, including the question of its validity, is al- "ways a matter to be expounded by the Court—as, "whether an order granting letters of administration "is valid or invalid. As already stated, this rule ap- "plies with peculiar force to the records of the par- "ticular Court."

To the same effect, see Sec. 1029.

Mr. Thompson, in his work on charging the jury, at Sec. 12 lays down the same doctrine in all of its force, and cites numerous authorities, both English and American. This Court has declared:

"The Court is bound to give an opinion to the jury "on a question of law upon request, if it be pertaining "to the issue."

Smith et al. vs. Carrington et al., 4 Cranch, 62.
See also Stearns vs. Reidy, 18 Ill. App., 582.

It was, then, certainly error to refuse this request. We understand counsel intend to urge that their admission on page 25 regarding the regularity of these attachment proceedings cures this palpable error of the Court. We do not so understand it. We cannot be compelled to depend upon counsel to state the law of our case to the jury. It is the duty of the Court to instruct the jury upon questions of law, and it is error to refuse to do so. The jury have a peculiar reverence for everything coming from the Court, and they pay much more attention to what is said by the Court as to the law of the case than they do to any admission or discussion of counsel. Besides, the counsel's admission does not go far enough. He simply admits that the attachment proceedings were regular and that the plaintiffs could not recover if Cannon was guilty of fraud and they had notice of the fraud. This is not sufficient, as decided by the Circuit Court of Appeals on the former appeal of this case. They cannot recover if they had knowledge of sufficient facts to put them upon inquiry. This counsel do not admit in this admission, and this is what our tenth request states which the Court refused. There is, then, no question but what this refusal of the Court to give the tenth request was material error in this case.

SIXTH.

It was error to give the fifth instruction. In the third instruction the Court tells the jury that the plaintiffs are only under obligation to establish their cause of action by a "fair preponderance of the evidence," but in this fifth instruction the jury are told that it devolves upon us who allege fraud to show the same by satisfactory proof, i. e., proof to the satisfaction of the jury. We contend this is not the rule. There is quite a distinction between showing our defense by a "fair preponderance of the evidence" and showing it by proof to the satisfaction of the jury. The evidence upon our defense might preponderate in our favor and yet the jury might be anything but satisfied that fraud had been established. We contend that this was error.

White vs. Van Horn, 15 Sup. Court Rep., 1027.

Bullard vs. Creditors, 56 Cal., 600.

Bump on Frauds, 2d Ed., 484.

Blaeser vs. The Milwaukee and M. M. Ins. Co., 37 Wis., 31.

Kane vs. H. I. Co., 39 N. J. L., 697.

Roberge vs. Burnham, 124 Mass., 277.

Carter vs. Gannels, 67 Ill., 270.

Reed vs. Norton, 48 Ill., 323.

Bryant vs. Simoneau, 51 Ill., 326; and cases cited.

Graves vs. Colwell, 90 Ill., 612.

The Ottawa, Oswego & Fox River Valley R. R. Co. vs. McMath, 4 Ill. App., 356.

Bauchwitz vs. Tyman, 11 Ill. App., 186.
Orient Ins. Co. vs. Weaver, 22 Ill. App., 122.
Field vs. Kinnear, 5 Kans., 233.

In Bauchwitz vs. Tyman, supra, the instruction given at the instance of the plaintiff was as follows: "If "the jury believe from the evidence that the defend- "ant was the plaintiff's tenant at a specified rent per "month, the defendant, by a preponderance of evi- "dence, must satisfactorily prove that he has paid his "rent for the time he was tenant; otherwise your ver- "dict should be for the plaintiff for any rent found "unpaid."

The Court then say: "This instruction imposed "upon the defendant a higher degree of proof than the "law requires. In civil suits a preponderance of the "evidence is all that is necessary. Here the jury were "told that the defendant must satisfactorily prove "that he had paid his rent. Under such an instruction "the jury might have said, 'Though we are of opinion "'that the evidence preponderates in favor of the de- "'fendant, we are nevertheless not quite satisfied "'about it, and so we find for the plaintiff.' The in- "struction as given was liable to mislead the jury, "and was, therefore, improper.

"The judgment of the Court below must be reversed "and the case remanded for a new trial."

In R. R. Co. vs. McMath, above cited, the Court say: "The second instruction given by the Court below on "the part of appellee was calculated to, and may have "misled the jury. It was to the effect if a paper was "signed by Whitfield, partner in the milling business, "and the act was not within the scope of the partner-

"ship, and without appellee's authority, then the jury "should find for appellee, unless it should appear from "evidence to the satisfaction of the jury that appellee, "with the knowedge that Whitfield had signed the "firm name to the contract, ratified the act of said "Whitfield.

"This instruction left it entirely within the discre- "tion of the jury to say what degree of evidence it "required to satisfy them. They were at liberty to "set up a higher standard than a mere preponderance "of the evidence, which was all the law required."

In Bump on Frauds, 2d Ed., 484, it is said: "Issues "of fact in civil cases are determined by preponder- "ance of the testimony, and the rule applies as well "where fraud is imputed as any other. If the evidence "produces a rational belief, it cannot be discarded, "though some doubt remains. If the evidence is of "sufficient force to produce a preponderance of assent "in favor of fraud, it is sufficient."

* * * * * * *

"It is the rule in all civil cases that fraud may be "established by a preponderance of the evidence."

In the Massachusetts case above cited it was held that: "In a civil case for selling liquor to a minor it "only requires proof to be made by a preponderance."

In the case of Blaeser vs. M. & M. M. Ins. Co., 37 Wis., 31, where a defense on an insurance policy was being made, and the charge was that the fire by which the insured property was destroyed originated through the willful procurement of the plaintiff, it

was held "that the case might be established by a "preponderance of the evidence."

It was stated by the Court in that case that "a few "authorities hold that the rule applicable in criminal "cases is the same in civil cases where a crime is im- "puted, but the reason and weight of authority is the "other way."

In Kane vs. H. I. Co., 39 N. J. L., 697, the question and discussion was the same as in the Wisconsin case just cited, and the Court say: "The contrary rule is "evoked in libel and slander where a justification im- "plies crime, but these are exceptions."

In Graves vs. Colwell, 90 Ill., 612, the first and second instructions given for the appellee were as follows:

"1. The jury are instructed that where a deed is "made to one of two persons of the same name, being "father and son, the presumption of law, in the ab- "sence of evidence upon the subject, is that the deed "was made to the father, and not to the son, and "this presumption must prevail unless the defendants "have overcome the presumption by proof showing, "to the satisfaction of the jury, that the deed was "made to the son and not to the father; and in this "case, if the testimony upon the question whether the "deed was made to Thomas Colwell, Sr., or to Thomas "Colwell, Jr., is so conflicting that the jury cannot "say from the evidence to which the deed was made, "then the jury must find that the deed was made to "the father and not to the son, under the presumption "of law above stated."

"2. The plaintiff in this case having offered in evi-"dence a deed from Mirandus B. French to Thomas "Colwell, and one from Thomas Colwell to Adolphus "Colwell and Presley Colwell, Jr., and one from "Adolphus Colwell to Presley Colwell, Jr., the jury are "instructed that these deeds offered in evidence by "him make a prima facie case in his favor, and the "burden of proof is upon the defendants to show, to "the satisfaction of the jury, that the Thomas Colwell, "from whom the plaintiff claims title, was not the "person who in fact owned the land and held the title "to the same; and unless the jury believe from the "evidence that the defendant has overcome this prima "facie case and shown, to the satisfaction of the jury, "that the Thomas Colwell who conveyed the land in "controversy to Adolphus Colwell and the plaintiff "was not the owner of the land and did not hold the "title to the same, they will find for the plaintiff."

The Court, in the opinion, declare the rule as follows: "As we understand these instructions, they are "not in conformity with the views of the law we have "herein expressed. The jury must have understood "they were required, notwithstanding they may have "believed that the defendants had made out a prima "facie defense by proving circumstances of sufficient "weight to shift the burden of proof and thereby set "aside the rebuttable legal presumption that other-"wise would have enabled plaintiff to recover without "proving the material fact in issue and on which his "case was predicated, nevertheless to return a verdict "for plaintiff, even though the weight of evidence was "against him, unless the preponderance of proof was "so greatly in favor of defendants as to satisfy their

"minds, a thing which could only be accomplished by "producing a state of moral certainty, or, in other "words, by proving beyond a reasonable doubt that "the son and not the father was intended. The in- "structions assume and the record shows the evidence "was conflicting; in that state of the case, it being a "civil suit, it was required of neither party more than "that it should produce a preponderant weight of tes- "timony."

In Field vs. Kinnear, 5 Kan., 233, the trial court had instructed the jury as follows: "Unless the jury are "satisfied from the weight of the evidence of the first "point, to-wit, of the violation of the contract, they "need not inquire further, but will return a verdict "for the defendant."

The Supreme Court of Kansas in the opinion in this case held that this word "satisfied" meant that the jury were to be convinced beyond a reasonable doubt; and to show that this was the meaning of the word, cited 1 Greenleaf Ev., Sec. 2. In the opinion, the Supreme Court then say: "He (a party) is bound to "prove his case by a preponderance of the evidence, "and if he has done so, however slight that prepon- "derance may be, he has sufficiently proved his case. "He should satisfy the jury that he has a preponder- "ance of the evidence, but he is not required to satisfy "them of the truth of his allegations. The jury may "have many doubts, and reasonable ones, too, of the "truth of the allegations, but if his evidence prepon- "derates over that of his adversary he is entitled to a "verdict."

For these reasons we contend that the instruction given was materially erroneous.

SEVENTH.

For the same reasons the Court erred in giving the sixth instruction, and the further reason that the jury were not told that it was only necessary to show that the plaintiffs had knowledge of sufficient facts to put an ordinarily prudent man upon inquiry.

EIGHTH.

In the eighth instruction, instead of instructing the jury as it did, the Court should have stated that the inadequacy of price was a badge of fraud, and should also have stated that the fact that the sale was made, if it was so made, in an unusual and out of the ordinary manner, was also a badge of fraud.

NINTH.

The Court erred in giving the tenth instruction for the same reason that it erred in giving the sixth. The jury are told that even if they believe that Cannon acted fraudulently, "yet if, on the other hand, you "should find that the plaintiffs had no intention of "participating in the fraud, or to aid and assist Can-"non in carrying out such fraud, in such case you "should find for the plaintiffs."

Now this is exactly what the case was reversed on before. It is not necessary that the plaintiffs should have participated in the fraud or intended to assist Cannon in carrying it out. It is only necessary that they have knowledge of facts sufficient to put them

on inquiry, and even if a correct instruction on this point was afterward given (which we insist was not), it was still error to tell the jury to find for the plaintiffs unless they participated in the fraud and intended to assist in carrying it out.

The error of giving a wrong instruction is not cured by giving other instructions which announce a different rule.

Lake Shore & Mich. So. vs. Ellson, 15 Ill. App., 80.

Pittsburg, etc., R. R. vs. McGrath, 15 Ill. App., 85.

Knowlton vs. Fritz, Ill., 5 App., 217.

Herdman-Harrison Milling Co. vs. Spehr, 33 N. E. Rep., 944.

TENTH.

The Court therefore erred in overruling our motion for a new trial, and in rendering judgment in favor of the plaintiffs and against the defendants.

CONCLUSION.

For all these reasons we think the judgment should be reversed. Each specification of error is sufficient alone to reverse this case. There is not a solitary instruction in our favor. There is not in any one of the Court's charges to the jury a statement of any hypothesis upon which the jury could find for us. It is true, he attempts to lay down the law of the case, but always ends up every instruction upon a theory

and hypothesis favorable to the plaintiffs. The first instruction is a statement of what the plaintiffs claim; the second tells the jury that we admit something which we did not admit; the third tells the jury that the plaintiffs only have to establish their cause of action by a "fair preponderance of evidence;" the fourth states a plain proposition of law; the fifth and sixth tell the jury that we must establish our defense by proof to their satisfaction, instead of by a fair preponderance of the evidence; the seventh, that they are to consider the surrounding circumstances; the eighth, that an inadequate price and unusual circumstances surrounding the sale instead of being evidence of fraud and badges of fraud, are mere circumstances to be considered; the ninth states a proposition of law; the tenth, that Collins & Bretch must have participated in the fraud and must have intended to aid and assist Cannon in carrying out the fraud before defendants can recover; the eleventh that they must still have notice of fraud, instead of facts sufficient to awaken suspicion; the twelfth and thirteenth really go together, and are on one subject, and the thirteenth ends by telling the jury that if the plaintiffs have no such notice—that is, notice of fraudulent intent instead of facts sufficient to awaken suspicion, that it is not necessary they should inquire further. The balance of the instructions are simply upon the amount of recovery, and directions to the jury concerning the form of the verdict. And, as we said before, there is not a single instruction which states any hypothesis upon which we are entitled to a verdict.

We had abundant evidence, so that the jury, if they

had been properly instructed, would have found in our favor at the trial.

The facts and the circumstances of this case show fraud of the most depraved character. We cannot be expected to establish our position by direct evidence. Of course these parties would not admit it. The record shows the most scandalous and disgraceful attempt by Collins, Bretch and Cannon which was ever perpetrated to cheat and defraud the creditors of the latter. The instruments of fraud do not proclaim their designs and we must establish it alone by circumstances.

It has been well said:

"Fraud is rarely susceptible of positive proof, for "the obvious reason that it does not cry aloud in the "streets nor proclaim its iniquitous presence from the "house-tops. Its vermiculations are chiefly traceable "by covered tracks and studious concealments."

There can be no question in the world but what Collins & Bretch in this case willfully and criminally closed their eyes and purchased this stock of goods for the purpose of making a large profit therefrom, well knowing that Cannon intended to defraud his creditors. The designs of Cannon are admitted, and it is not denied by plaintiffs that they knew that Cannon was indebted several thousand dollars to the bank, and they must have known that a young country merchant like Cannon did not buy for cash.

They bought these goods the middle of April, just after five or six thousand dollars worth of new goods had been incorporated into the stock. The invoice

was taken after night, with closed doors, and before any invoice whatever had been taken, every cent of the purchase money, amounting to six thousand dollars, had been paid. This is a most remarkable circumstance. It goes plainly to show that Cannon and Collins & Bretch were alert in their criminal scheme to cheat and defraud E. H. Van Ingen & Co. and others from whom Cannon had purchased goods. Why was the purchase money all paid before a single dollar's worth of goods had been invoiced? Why agree upon the price before the invoice was made? They say fifty cents on the dollar was to be paid for this stock, and that if the goods invoiced over twelve thousand dollars they were to pay Cannon fifty cents on the dollar for the balance, but admit that this was never paid, though the goods invoiced, according to their own statement, a little over twelve thousand dollars.

Here was a concocted scheme to get rid of these goods and make way with the proceeds. Collins & Bretch, these innocent (?) purchasers, had never been in the men's furnishing goods business before. They did not buy this stock to go into the business; bought it to make a large profit on it. They, together with McLain, cashier of the bank, had been in the business of putting up just such jobs as this before. They made way with a stock of boots and shoes a very short time before this Cannon deal.

This Cannon arrangement was secretly made in the back room of the Newton National Bank, where the boot and shoe scandal had been consummated. Cannon paid five hundred dollars of this money to his attorneys for advice, well knowing that trouble would

come. This was a most outrageous fraud upon the creditors—taking our money to get ready to litigate us.

Collins & Bretch, well knowing that Cannon required the money in advance; that he was in debt several thousand dollars; that five or six thousand dollars worth of goods had just been put into the stock; that they were buying the whole store, worth $17,000, for $6,000; that Cannon required the invoice made secretly after night—come up like little lambs and want us to believe that they had no suspicion whatever that Cannon intended any fraud against his creditors. They got back from the sheriff six thousand dollars worth of goods, and now want us to pay them enough more that they may realize nearly ten thousand dollars out of this willful conspiracy to cheat and defraud these New York merchants.

We undoubtedly should have had our objection sustained to the Collins deposition; should have had the admission contained in the replevin affidavit of Collins, that the goods which the marshal left were worth six thousand dollars, to go to the jury; should have had our objection to the evidence of Bretch sustained; were entitled to have our tenth request given with the instructions; and should also have had the case go to the jury upon correct and proper statements from the court as to the law of this case. With the facts and circumstances as they are shown by the evidence, with correct rulings and proper instructions, we will certainly get from the jury a verdict in favor of the defendants.

We therefore insist that for these reasons the judg-

ment of the Circuit Court of Appeals and the judgment of the Circuit Court should be reversed and the case remanded to the State Court, and that a new trial be granted.

W. E. BROWN,

Attorney for Plaintiffs in Error.

MAR 16 1896
JAMES H. MCKENNEY

(15,484)

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1895.

NO. 316.

R. L. WALKER, JAMES McMURRAY, CHARLES HOWARD, AND A. J. PARTRIDGE, *Plaintiffs in Error*,

vs.

E. COLLINS AND W. H. BRETCH, (PARTNERS AS COLLINS & BRETCH,) *Defendants in Error.*

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF DEFENDANTS IN ERROR.

A. P. JETMORE,
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COUNSEL FOR DEFENDANTS IN ERROR.

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BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF CASE.

The defendants in error sued plaintiffs in error in the district court of Harvey county, Kansas, to recover for the wrongful conversion of a stock of goods. On the petition of plaintiffs in error, the case was removed to the circuit court of the United States for the District of Kansas on the ground that it was one arising under the laws of the United States.

For convenience, we shall designate the parties,

as they appear in the controversy at the trial, as plaintiffs and defendants. The cause of action, as stated in the petition or complaint, is that on April 18, 1890, the plaintiffs, Collins & Bretch, were in possession and owners of a certain stock of goods at Newton, Kansas; that on that day the defendants, Walker, McMurray, Howard and Partridge, forcibly took possession of said goods and wrongfully converted the same to their use to the damage of plaintiffs in the sum of ten thousand dollars. In defendants' answer to the petition, they justified the taking and conversion by alleging that they, as marshal and deputy marshals, seized the goods under and by virtue of a certain writ of attachment theretofore issued out of the circuit court of the United States, in an action in which Van Ingen & Co. were plaintiffs and one H. Cannon was defendant; and that whatever right or title Collins & Bretch, the plaintiffs, had or have to the goods, so seized, they got by virtue of a transfer thereof to them by Cannon, which transfer was made for the purpose of hindering, delaying and defrauding Cannon's creditors, which, said Collins & Bretch well knew at the time; and that such goods were, therefore, liable to be seized by virtue of said writ as the property of Cannon. To this, plaintiffs replied by a general denial.

The case having been removed from the state court to the circuit court, as stated, it was there tried on these pleadings and the evidence to a jury. Verdict and judgment for plaintiffs, which was reversed in the United States Circuit Court of Appeals. (50 Fed. Rep. 737.) The case was again tried in the circuit court, November, 1892, which again resulted in a verdict and judgment for plaintiffs, whereupon, defendants sued out a writ of error from the Circuit Court of Appeals for the Eighth Circuit, by which

the judgment was affirmed, (59 Fed. Rep. 70,) and a writ of error from this court having been allowed the case is now here for review. The opinion, on the affirmance by the circuit court of appeals, was delivered by Judge Caldwell, and is set forth in the record.

It is claimed here that the circuit court at the trial again erred in certain of its proceedings, and that the circuit court of appeals erred in not reversing the judgment of the circuit court on account thereof, as set out in the record and contained in the assignment of errors in this court.

ARGUMENT.

In the preparation of this brief, we assume that as to the several points raised by the assignment of errors in this court, counsel for plaintiffs in error will contend as he did in his brief in the circuit court of appeals. In referring to the record herein, we shall cite the pages of the printed record.

FIRST.

THE ADMISSION IN EVIDENCE OF DEPOSITIONS.

As the facts have been found by the jury, the questions to be determined are those that arise upon the exceptions. Of these, the first in the order of the assignment of errors in this court (record p. 62) is the one founded upon the action of the trial court in admitting in evidence the deposition of E. Collins.

In the circuit court of appeals, it was earnestly contended by defendants that the trial court

committed material error in admitting this deposition in evidence, because the same had not been on file one clear day before the commencement of the trial, as required by the terms of sec. 361, Kansas Code of Procedure.

As this deposition was taken and returned into court under the provisions of secs. 863, 864 and 865, Revised Statutes of the United States, we think the provisions of the state code do not apply.

After providing what shall be done with a deposition taken under secs. 863 and 864, Revised Statutes, it is further provided by sec. 865 that, unless certain things appear to the satisfaction of the court, such deposition shall not be used in the cause. This is equivalent to saying that if the facts therein mentioned do appear, then the deposition shall be used; and it is against reason to say that a deposition taken pursuant to the federal statutes can not be used in the federal courts—though the contingency exists, upon which it is declared admissible by such statutes—because some provision of the state law in reference to the taking, transmitting or depositing in court of depositions may not have been complied with.

The right to take testimony by deposition, including the right to use the same in evidence in common law cases in the federal courts, depends upon the statutes of the United States, and not upon the statutes of the states in which such courts are held. Of course, when such right exists under the statutes of the United States, then, as to the mere mode of procuring depositions, parties may follow at their election, the state law or the act of Congress—*McLennan v. Kan. City, St. Joe & C. B. R. R. Co.*, 22 Fed. Rep. 198; and the act of Congress, March 9, 1892, simply enacts into a statute this proposition, and nothing more.

When a deposition is taken under secs. 863, 864, Revised Statutes, as was the deposition in question, then, by the requirements of sec. 865, it shall be retained by the magistrate taking it, until delivered into court, where it shall remain under his seal until opened, and, if it then appears to the satisfaction of the court that the witness is dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition may be used in the cause. The limitation on the use of a deposition taken under the acts of Congress being thus fixed, there is no room for the operation of a state statute, fixing other or further limitations on the same subject, such as that, to be used, a deposition must be published before the trial, or filed before the commencement of the term, or day of trial, or that notice of its intended use must be served on the opposite party, and other like provisions, to be found in the statutes of the several states.

It was stated in counsel's brief in the circuit court of appeals that this deposition was admitted in evidence at the trial, on the ground that it had been on file one clear day before the day of trial, and that therefore, the section of the Kansas code cited, had been complied with. We did not understand the trial court to so hold. It may not clearly appear from the bill of exceptions, but, as we understood the judge when he admitted this deposition in evidence, he was controlled by consideration of the fact that, in the first place, the deposition was taken and transmitted to court, not under the laws of the state but in pursuance to the federal statutes and therefore, the provision of the Kansa code in reference to filing depositions did not apply; but that if it did, it ought

not to be applied in this case for the reason that defendants had, before making this objection, waived all other objections thereto, (record pp. 21, 22,) thereby leading plaintiffs to the belief that the deposition was unobjectionable to them and that there would be no exceptions to its use on the trial, and that to sustain this objection which was not presented until after the commencement of the trial, would be giving defendants the advantage of a point in which there was no real merit, at a time when plaintiffs could not without considerable expense, and the court without great and vexatious delay in its proceedings, remedy the matter by an adjournment or continuance. The trial court therefore properly held, that this objection, under the circumstances, was unfair and came too late.

Doan v. Glenn, 21 Wall. 33.

Howard v. Mfg. Co., 139 U. S. 199.

It is true, as claimed by defendants on the argument in the circuit court of appeals, that the trial court held that even if the Kansas code applied, this objection was nevertheless bad because *orally* made. Whether this is so or not, we do not care to take the time here to consider. The precise point has not been determined, so far as we know, by the Supreme Court of Kansas. We simply cite sec. 363 of the Kansas code, which reads: "Exceptions to depositions shall be in writing, specifying the grounds of objection, and filed with the papers in the cause," and *Insurance Co. v. State Bank*, 50 Kan. 428.

Even if this court should be of the opinion that the Kansas code, in reference to the filing and use of depositions, applies to depositions taken under the federal statutes and to be used in the federal courts, we submit that, nevertheless, the objection in this case was properly overruled. The evident purpose of this provision of the code, requiring depo-

sitions intended to be read, to be filed at least one day before the day of trial, is to give the opposite party opportunity to make his objections and exceptions thereto, before the trial, as required by secs. 363, 364 and 365 of the same code. If, therefore, a party has waived all objections he may have to a deposition, as defendants did in this case, the purpose and object of the statutory requirement mentioned, as to such case, no longer exists, and the objection ought to be considered as substantially waived. At most, it comes in this case as a bare, naked, technical objection, divested of all merit.

Again, in the state of the record, and in view of the *eleventh* rule of the United States Circuit Court of Appeals for the Eighth Circuit, which requires that "when the error alleged is to the admission or rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected," which is substantially a repetition of the *twenty first* rule of this court, the admission of this deposition in evidence, and the action of the circuit court of appeals in not reversing the judgment of the trial court on account of it, cannot, as we understand it, be properly assigned as error. The bill of exceptions does not contain a copy of the deposition nor the substance of its contents. There is nothing in the record to show what was contained in such deposition. The circuit court of appeals, in passing on this question was unable to see, and this court cannot say, that the admission of this deposition in evidence was prejudicial to defendants. In principle, the case of *Packet Co. v. Clough*, 20 Wall. 528, 542, is in point here. In that case, one of the assignments of error was the rejection of a deposition, and in reference to that assignment, this court said:

"It is sufficient to say that we have not before us either the deposition or any statement of what it

tended to prove. We cannot know, therefore, that it was of any importance, or that, if it had been admitted, it could have had any influence upon the verdict. A party who complains of the rejection of evidence must show that he was injured by the rejection. This bill of exceptions must make it appear that, if it had been admitted, it might have led the jury to a different verdict. This must be understood as the practice in this court, and such is the requirement of our twenty-first rule. By that rule it is ordered that, when the error assigned is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. This is to enable the court to see whether the evidence offered was material, for it would be idle to reverse a judgment for the admission or rejection of evidence that could have had no effect upon the verdict."

See also, *Shauer v. Alterton*, 151 U. S. 607, 626, s. c. 14 Sup. Ct. Rep. 442, 444, and cases there cited.

See also *Haldane v. United States*, (C. C. A. Eighth Circuit,) 69 Fed. Rep. 819, 821, where it is held that:

"Alleged errors in the admission and exclusion of evidence will not be considered by the circuit court of appeals, unless the testimony alleged to have been erroneously admitted or excluded is set out substantially in the assignment of errors and the brief, as required by rules 11 and 24 of that court."

REJECTION OF EVIDENCE.

We come, now, to examine the second exception, which we suppose will be urged here, arising out of the trial court's action in excluding "exhibit 4," offered by defendants in evidence, and which is the second specification in the assignment of errors in this court.—Record, p. 62.

On the former trial of this case, it appeared in evidence that, after the levy of the attachment by the marshal, certain other creditors of Cannon, proceeding in the state court, procured attachments to be levied by the sheriff upon the balance of the stock not seized by the marshal; that

Collins & Bretch replevied these goods in the state court, (Collins stating, in the replevin affidavit filed in such case, that the goods so replevied were worth $6000.00,) and that in such state court judgment in the replevin suit was in favor of Collins & Bretch. Defendants, in this connection, then offered evidence to show that no appeal had or would be taken from the judgment thus rendered in such replevin suit, contending in support of its admissibility that as the judgment in replevin was final, plaintiffs should be made to account to defendants in this case for the value of the goods so secured, and that if the property so finally adjudged to them, and not taken by defendants, amounted in value to $6000.00, (that being the sum paid by plaintiffs to Cannon for the whole stock) then plaintiffs had lost nothing by defendants' trespass and could not therefore, recover in this action. —See, *Walker et. al. v. Collins et. al.*, 50 Fed. Rep. 4th par. *syla.* p. 738, and opinion of court, pp. 740, 741.

On the last trial of this case, counsel again having the same point in view, offered in evidence "exhibit 4," claimed to be a copy of the replevin affidavit mentioned, which offer was followed by an offer in evidence of "exhibit 3," the same being a written stipulation of the parties in the replevin suit, that the judgment therein should be final.—See record, pp. 26, 27, 28, 29. That "exhibit 4" was offered in evidence solely to support this contention of defendants is clear. The bill of exceptions states that the said "exhibit 4" was offered in evidence "for the purpose of showing that in the replevin suit against the sheriff, plaintiffs had recovered from the sheriff the goods left by defendants in the store at Newton; that these goods were worth $6000.00, the full amount of the purchase price of the whole stock, paid by plaintiffs to Cannon; that therefore, plaintiffs had lost nothing by defendants taking what they

took in this case, and that as against the attaching creditors whom the defendants represented in this case, the plaintiffs could not recover the goods in question in this action."—Record, p. 27.

And that it was with this purpose in view that this exhibit was offered in evidence, further appears from certain instructions requested by defendants at the trial, (record, p. 34,) which were as follows:

"Sixth. The jury are instructed that if H. Cannon bought the goods in question, by means of false, and fraudulent statements and never paid for the same, and procured credit by means of false and fraudulent statements as to his financial condition, and then sold such goods to Collins & Bretch, with the intention not to pay for such goods so obtained by reason of false and fraudulent statements, such sale would in law be in fraud of creditors; *and if you find that a portion of such goods were attached in a suit in the district court of Harvey county, Kansas, and replevied by Collins & Bretch and recovered in such replevin case, and if you further find that the value of the goods replevined in such suit in the district court of Harvey county, Kansas, was $6000.00, and if you find that the amount paid for the whole stock of goods by Collins & Bretch was $6000.00 then in such case your verdict should be for the defendants in this case.*

"Seventh. The jury are further instructed that if H. Cannon bought the goods in question, or any portion of the same, by reason of false and fraudulent statements as to his financial standing, and then sold the same to Collins & Bretch, and that a portion of such goods were attached by parties which Cannon owed, and such goods replevied by Collins & Bretch, *and Collins & Bretch in such replevin case recovered a portion of such goods, then your verdict should be only for the difference in the value of the goods so recovered in such replevin case, and the amount actually paid for the whole stock of goods by Collins & Bretch, and if you find that Collins & Bretch have recovered an amount of goods equal to the amount actually paid for the whole stock, then your verdict in this case should be for the defendants.*"

While defendants specified the court's refusal to

give these instructions to the jury as error, in the assignment of errors in the circuit court of appeals, (record, pp. 43, 44,) yet in their brief and argument in that court, they practically abandoned the theory embodied in such requests, and there insisted for the first time, that such "exhibit 4" was competent and admissable in evidence upon another ground, to-wit, that it tended to show that in the purchase of the goods from Cannon, plaintiffs had paid therefor an inadequate price. Following the well settled rule, that when a party offers evidence for an expressed purpose, for which it is incompetent, he will not be allowed to change his base in an appellate court and there, insist that the trial court erred in not admitting it, on a ground or for a purpose disclosed and urged for the first time in such appellate court, the circuit court of appeals properly refused to entertain or consider this latter contention.—Opinion of circuit court of appeals, record, pp. 57, 58.

In this court, defendants have entirely abandoned the theory embraced in the foregoing requests. We assume this, from the fact that the refusal to give these instructions is not assigned as error in the assignment of errors here, and we presume they will base their whole contention here, in support of the admissibility of this exhibit in evidence, on the ground that it was competent to show that plaintiffs paid an inadequate price for the goods. In urging this ground in support of its admissibility, in the circuit court of appeals, defendants' counsel, with more shrewdness than candor, asserted in his brief that, "the bill of exceptions states that it (exhibit 4,) was offered in evidence for *several* purposes; for the purpose of showing that in the replevin suit the plaintiffs had recovered the goods left in the store in Newton; *second*, that these goods were worth $6000.-

00; *third*, that as this was the full amount of the purchase price, therefore the plaintiffs had lost nothing by the defendants taking what they did; *fourth*, that as against the attaching creditors whom the defendants represented in the case, the plaintiffs could not recover." Having thus attempted to divide the *single* purpose, for which this evidence was offered, into several separate purposes by interpolating into the language of the bill of exceptions the numeral words, "second," "third" and "fourth," counsel proceeded to contend with much assurance that for his *second* purpose, to-wit, that the goods were worth $6000.00, the evidence was certainly competent as tending to show that plaintiffs had paid an inadequate price to Cannon for the stock, and he gravely argued that it should have been received in evidence for this purpose notwithstanding it was offered for his *three* other purposes for which it might not have been competent.

That the purpose for which this evidence was offered, was single, and that it was offered for the sole purpose claimed by us and as found by the circuit court of appeals, (opinion of court of appeals, record, pp. 57, 58,) and that the contention that it was offered to show that plaintiffs, in the purchase of the stock of goods from Cannon, paid an inadequate price is an after thought–seems to us quite clear.

This evidence then, having been properly excluded on the objection to it for incompetency, irrelevancy and immateriality, it is unimportant to inquire whether the further objection that it was not the best evidence, is sound or not. We call the court's attention to the fact, however, that the only positive evidence that "exhibit 4" is a true copy of the original affidavit, is the sworn statement of defendants' counsel that it is a true, correct, full and complete copy to his certain knowledge, which we submit, is

more a statement of a conclusion of fact, than a statement of the facts, upon which the conclusion is based. This witness did not say that he ever compared this pretended copy with the original, or in any other way show to the court how he knew it to be a true copy. Again, the original affidavit was traced from the office of the clerk of the district court of Harvey county, Kansas, where it belonged, into the hands of defendants' counsel, and thereafter it was not found, but there was no showing that any search had been made by these gentlemen for it.—Record, pp. 26, 27. We do not know how this sort of showing struck the trial judge, as he did not, that we now recollect, specially pass on it. Our opinion is, that he was content to rest his ruling principally, if not entirely, on the ground of the incompetency and immateriality of the evidence, for the purpose for which it was expressly offered.

THIRD.

EVIDENCE OF VALUE OF GOODS.

The third exception, as contained in the assignment of errors in this court, arises out of the admission in evidence of the amount realized by plaintiffs from the sale of the goods remaining in their store after the marshal had made his levy, together with evidence of the expenses connected with the sale thereof. This same question was before the circuit court of appeals when this case was there for review the first time, and that court in passing upon it said:

"The theory upon which this evidence was admitted was that it would throw some light upon the question of the actual value of the goods sold by

Cannon to Collins & Bretch. That question was certainly a material one in the case, for the adequacy or inadequacy of the price paid was a circumstance to be weighed by the jury in determining whether the purchase was or not made in good faith. The evidence tended to show that the goods were sold by Collins & Bretch in the ordinary way of business, and that due effort was made to realize their fair value, and the result thereof would certainly be some evidence upon the question of the fair market value of the goods thus disposed of; and, as we have already said, this value was a matter to be weighed by the jury in determining the validity of the sale to Collins & Bretch. The evidence objected to was introduced in rebuttal for the purpose of meeting the claim of defendants that the value of the goods sold was largely in excess of the price paid, and it was not error to admit it."—*Walker et. al. v. Collins et. al.*, 50 Fed. Rep. 741.

This evidence was admitted by the trial court, in rebuttal, upon the theory and for the purpose stated in the opinion of the court of appeals, just quoted. As shown by the evidence, plaintiffs had purchased the goods in question from Cannon, for which they paid him $6000.00. Defendants claimed, among other things, that the sale from Cannon to plaintiffs was a fraud and made to defraud Cannon's creditors; and in support of this claim, they contended that the goods were worth much more than the price so paid. It was asserted by the plaintiffs, on their side, that the price paid by them was a fair one. That not only was a portion of the goods old, out of style, and unsalable, or at least difficult to dispose of, but that the invoice under which they bought was based on Cannon's markings, and that Cannon had the goods marked from 15 to 20 per cent. above cost and carriage.

The stock in question consisted largely of gent's furnishing goods, and it is common knowledge that in every retail store carrying such articles there are more or less goods which by reason of being carried

over one or more seasons, are out of style and therefore, if not entirely unsalable, greatly reduced in their market value, and difficult to dispose of. It would seem then, that in determining the question as to what such a stock was worth, the difficulty and expense of disposing of it on the market, would be a natural and proper element for consideration, and, that what it actually brought on the market in a *bona fide* endeavor to dispose of the same at retail, and the necessary and reasonable expenses attending such sale, would certainly throw some light on the question. How the difficulty in disposing of such goods and the money they would bring on the market at retail, could be better demonstrated than by showing the time it took to dispose of them in that manner, what the necessary and reasonable expense was in making such disposition, and the amount of money they actually brought, it is difficult to conceive. It is hardly to be supposed that the plaintiffs squandered these goods upon the market, in order that they might be able after all to show that the price which they had paid for them was a fair one. Such action would lose them the fruits of the fraud alleged against them. The evidence, however, tended to show, as said by the circuit court of appeals, that the goods were sold by the plaintiffs in the ordinary way of business, and that due effort was made to realize their fair value, and the answer of the witness, Bretch, to the question before the last, on p. 30, record, is substantially to that effect. The value of the goods, not carried off by the defendants but which were left in plaintiffs' store, and concerning which, the evidence complained of was admitted, come in question, as has been stated, by reason of defendants' claim that plaintiffs fraudulenly purchased the stock of Cannon, which was sought to be supported upon the ground, among others, that the price paid to

Cannon by plaintiffs was inadequate. To meet this claim, we submit that plaintiffs had the right to show the character of the stock, its condition, the sale of it in the usual course of trade, the manner in which the disposition of such goods was conducted, the efforts and time required in making such sale, the attendant expenses, the price realized, and every other fact concerning it which might tend to solve the question of the adequacy or inadequacy of the price paid by them to Cannon. It is the policy of the law to permit trial courts to be liberal in the admission of evidence in the investigation of alleged fraud, that the *bona fides* as well as the *mala fides* of the transaction in question may be ascertained. The point then, as to the value of these goods, having been raised in connection with and as incidental to the question of good faith in plaintiffs' purchase of the whole stock from Cannon, it was competent for plaintiffs to show in evidence any fact however slight, that would tend to throw light upon it. It is said, that the true test as to the admissibility of evidence on a question of fraud, is whether the evidence can throw light upon the transaction or is altogether irrelevent. Bump, Fraudulent Conveyances (First ed. 1872) p. 542.

The goods, concerning the condition and value of which, the evidence in question was admitted, were not carried off and converted by the defendants, and plaintiffs were not seeking a recovery against them for their value. But leaving aside the question of fraud, and supposing that the evidence objected to had been admitted to show the worth of the goods on the issue of value as it is ordinarily raised in the action of trover and the like, it would, both in reason and according to many adjudged cases, still be unobjectionable. What is market value? The word "market" conveys the idea of selling, and the market

value, it would seem to follow, is the selling value. It is the price which an article will bring when offered for sale in the market, or, as was so well and tersely put by Judge Lumpkin, in *Harrison v. Young*, 9 Ga. 359, "the value of land or any thing else is the price it will bring in the market." If then, the term value, when applied to property of any description, ordinarily means the price which it will command in the market, it would seem that the price which it sold for at a *bona fide* sale in the usual way of trade, ought to be some evidence of its value. And so, in a modern english case, where a co-owner of land, having sold the same representing that he had authority of all the owners, but which sale was disavowed by the others, was sued by the vendee for damages based on the difference between the contract price and the market price of the land, it was held that the sum obtained on another sale of the land by the lawful owners, was *prima facie* evidence of the market price.—*Godwin v. Francis*, 5 L. R., C. P. 295.

On an issue of the real value of land at the time it was sold, evidence was admitted as to the prices realized by the purchaser on sales of small parts of it a few months after his purchase. *Held*, not to be necessarily incompetent and not error, and that its allowance was within the discretion of the trial court.—*Montgomery v. Sayre*, 100 Cal. 182, 34 Pac. Rep. 646, 648.

In an action against a sheriff for the wrongful sale, under an execution against a third person, of a stock of goods owned by the plaintiff, evidence of what the purchasers (execution creditors) at the execution sale obtained for the stock at *bona fide* private sales in cities some miles distant from the place of conversion, and nearly a year afterwards, held competent as tending to prove the market price of the goods at the time of the conversion.—*Parmenter v.*

Fitzpatrick, 135 N. Y. 190, 31 N. E. Rep. 1032, 1035. In this case, the inquiry was, as to the competency of evidence of the price an article sold for at private sale as bearing upon the question of the value of that property. The opinion by Peckham, J., is quite exhaustive and the logic of it unanswerable. Among other things, it is there said:

"The market price of personal property is nothing but the general or ordinary price for which property may be bought and sold. There is no particular number of sales necessary to be proved before such price can be said to be established. It seems plain, however, that proof of the price obtained at an actual sale made *bona fide*, and not a sale which was in any way forced, would tend in the direction of proving or establishing a market price, and hence would be some evidence of the value of the property sold. It might not, and, indeed, it is not claimed to be conclusive, but it seems to be competent upon that question. If there were no other evidence upon the subject, it certainly would be sufficient for the jury to base a verdict upon, and, if there were other and contradictory evidence, then it should be placed before the jury for its consideration upon the question of value. A market price is simply the result of sales of the same kind of property. In the ordinary case of purchase and sale of property, the fact that the purchaser and seller have met and agreed upon a price, and actually bought and sold the property at that price, ought to be, in the nature of things, some evidence of the value of that property which has thus changed hands in a *bona fide* transaction, * * * It is evidence of an actual sale, and on that account tends to show the market price, and also the value of the property sold. The parties selling this property were in the position of most owners wishing to sell, and desirous of getting the highest price they could, they had purchased it at a certain price, and any sale below it left them losers, and any sale at a greater sum left them the gainers."

In an action against warehousemen for conversion of furniture, evidence of what the goods brought on a sale by defendants at auction, *held*, admissible on the question of value.—*Sanford v. Peck*, 63 Conn. 486, 27 Atl. Rep. 1057, 1059. In this case, to prove what

the fair actual value of the merchandise was at the time of the conversion, the defendants offered evidence of what the goods brought at auction, and upon plaintiff's objection, the trial court excluded it, and for this, the judgment was reversed. In the opinion, it is said:

"It seems to us that this evidence should have been admitted, the expressions 'actual value,' 'market value,' or 'market price,' when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales, public or private, in the way of ordinary business. It appears from the finding that the court, while excluding the evidence of what the goods of the plaintiff actually brought at the said sale, admitted proof of the fair market value of the goods at the time of the auction, from the opinion of purchasers and persons present. The latter proof being admitted, it is not easy to preceive why the former was excluded. The opinion of a witness as to the fair market value of a commodity must be formed from sales of some kind; otherwise, the opinion could not be of the market value. The opinion of the persons present at the auction as to what was the fair market value of the goods there sold would almost inevitably be formed in part, if not wholly, from the price which the articles brought at that sale. It would seem that the jury could better judge of the fair actual value of the goods by knowing the exact price which they brought, than by depending upon the opinion of witnesses as to what they ought to have brought, * * * A sale is a matter of fact, not of opinion, and is direct evidence of the real worth of the thing sold. Indeed, the price for which an article is bought and sold constitutes its market value, and is ordinarily the best and most satisfactory standard by which to estimate the amount at which the same or similiar articles are to be appraised in the assessment of damages. The competency of such evidence cannot be made to depend on the form or mode or the particular terms of the contract of sale. These circumstances may have an essential bearing on the weight to be given to the fact of sale, as affecting the price, and as indicating the par value of the property, and they are proper for the consideration of the jury; but they cannot operate to exclude the evidence altogether."

In a very recent case in Iowa, it was held, that, in an action of trover by a landlord against a purchaser from his tenant of property subject to the landlord's lien, evidence as to what defendant paid or agreed to pay for the property, is admissable as tending to show its value.—*Thompson v. Anderson*, 63 N. W. Rep. 355, 356.

Evidence of the price brought by a farm at a mortgage foreclosure sale fifteen months after its transfer to plaintiff is admissible to fix its value in an action for deceit in such transfer.—*Brady v. Finn*, 162 Mass. 260, 38 N. E. Rep. 506. In this case, it is said, that the fact that the sale was made so long after the purchase by the plaintiff does not render the evidence incompetent.

In an action against a carrier for injuries to grain shipped, evidence of the price procured by plaintiff for damaged oats after a fair attempt to obtain the best price, was held competent evidence of their value.—*Ala. & V. Ry. Co. v. Scarles*, 71 Miss. 744, 16 So. Rep. 255.

In an action for conversion, evidence of the price for which defendants sold the property at private sale was offered by them as evidence of its value, and upon objection by plaintiff, the evidence was excluded, *held*, error.—*Bowdish v. Page*, 81 Hun. 170, 30 N. Y. Supp. 691, 695, 696.

In an action for conversion of goods sold under attachment at auction sale, the price obtained at such sale, held to be competent evidence on the question of value.—*Baker v. Seavey*, (Mass. 1895,) 40 N. E. Rep. 863.

In an action for the conversion of chattels, it was held competent to show what they cost when new, even though they were deteriorated from usage at the time of their conversion, as the price paid for them when new is some evidence of their value.—*Hawver v.*

Bell, 141 N. Y. 140, 36 N. E. Rep. 6, 7. In this case, it is said, "that the price paid for these articles when new furnished some evidence of their value at the time of their conversion, their age and condition being described, cannot be doubted."

And, in an action against a sheriff, to recover the value of a stock of goods, seized by him on a writ of attachment against plaintiff's vendor, which he afterwards sold at an official sale, it was held that the amount received for the stock at such sale, was competent evidence of its value.—*Douglass v. Hill*, 29 Kan. 527, 531.

Courts are growing more liberal in the investigation of the value of property, as an examination of the later cases will show; some of them going so far as to hold evidence of the selling price of property other than that in dispute, admissible on the question of value of the property in controversy, as in a late South Carolina case, where, in an action against a railroad company for damages from a defective culvert, which caused plaintiff's land to be flooded, it was held competent in determining the comparative value of the land before and after the injury, for defendant to show by plaintiff what he received for adjacent lands sold after the flooding.—*Gentry vs Rich. & D. Rld. Co.* 16 S. E. Rep. 893, 894. In this case, error was assigned by plaintiff on the ground that he was required to testify what he received for other lands near the lands damaged, sold by him long after the freshet, and in holding such evidence competent, the court said:

"While it was very true that such testimony was not calculated to throw much light upon the material inquiry in the case, and might have been entitled to but little weight, yet it certainly was competent, and it was for the jury alone to consider whether it was of any value at all, and, if so, what weight should be attached to it. The material inquiry being how much the land was damaged, its

comparative value before and after the disaster occured to which the injury was attributable afforded a good test; and to determine this, it was clearly admissible to show what adjacent lands had actually sold for, as that would afford some, though perhaps very little, evidence, owing to the rise in the price of lands and perhaps other causes, of the value of the land in question both before and after the freshet."

The liberal position thus taken by the courts with reference to the admission of evidence of value is not confined to questions of value of property, but is extended to inquiries concerning the value of services and the like. Thus, in an action by the father to recover for loss of services of his minor son, evidence of what the son's employer was paying him was held competent as tending to show the worth of such services,—*Sawyer v. Sauer*, 10 Kan. 519, 525. In this case, it was insisted that there was no evidence that the services were worth anything; that the measure of damages is what such services were worth, and not what was being paid by his employers. In answer to this contention, the court, by Brewer, J., said, "In the absence of all other testimony a jury is warranted in finding a party's services worth that which his employers are paying him."

And again, in a suit on the *quantum meruit*, for work, it was held that evidence on behalf of defendant as to what he could have had another do it for was proper, as tending to strongly show what plaintiff's work was worth.—*Klopp v. Jill*, 4 Kan. 482, 487.

And, when defendant failed to show by any admissible evidence that there was any rental value for a silver mill, it was held, not error, to admit evidence of the value or the amount of ore delivered and milled, as tending to show such rental value.—*N. Y. & Colo. Mining Syndicate & Co. v. Frazer*, 130 U. S. 611.

As said by *Mr. Justice* Shiras, in *Holmes v. Goldsmith*, 147 U. S. 150, 164, "The modern tendency, both of

legislation and of the decisions of courts, is to give as wide a scope as possible to the investigation of facts." And, as we understand the later and better authorities, it is enough if the evidence tend, even in a slight degree, to assist, though remotely, in a determination of the truth.

FOURTH.

INSTRUCTIONS REFUSED.

Defendants requested the court to give ten separate instructions to the jury, all of which were refused, the refusal to give each of these requests was assigned as error in the circuit court of appeals, but the alleged error in the refusal to give the tenth one, is alone presented for consideration here by the assignment of errors in this court. The instruction requested and in question, is to the effect that the attachment proceedings against Cannon were regular, and a protection to defendants in this case, if the plaintiffs bought of Cannon in bad faith, etc.

We are unable to see how or in what way the court's refusal to give this instruction, prejudiced defendants. It was expressly admitted by plaintiffs to the court and jury, on the trial, that the attachment proceedings were regular and valid, a full justification and protection to defendants and entitled them to recover as against plaintiffs in this case, if plaintiffs' purchase from Cannon was not good, as against the attaching creditors.—Record, pp. 25, 26. This being conceded, and the case having been tried on that theory and understanding, as is obvious from an examination of the record, we fail to see the

necessity for this instruction. The jury were not only informed by the open admission of plaintiffs that, if their purchase from Cannon was fraudulent, they could not recover in this action, but the charge of the court, with sufficient clearness, indicated the same thing, and that the jury so understood it, cannot be doubted. This being so, how much stronger would it have made defendants' case for the court to have further and formally told the jury that the attachment proceedings were regular and a protection to the defendants, etc.?

But counsel for defendants contended on the argument in the circuit court of appeals, that plaintiffs' admission was too limited because, as was said, plaintiffs simply admitted that the attachment proceedings were regular and that they could not recover if Cannon was guilty of fraud and they had *notice* of it. This, it was claimed, was not sufficient, for plaintiffs also could not recover if they had knowledge of sufficient facts *to put them upon inquiry*. It seems to us like straining reason, to insist that the court erred in refusing this instruction because of any such supposed incompleteness in the admission. The admission, however, as shown by the bill of exceptions, contains the words, *any notice*, which expression comprehends within its meaning constructive as well as actual notice. Besides, the jury could not have been misled by any lack of fullness or accuracy of expression, in the admission on this point, since the court in the twelfth paragraph of the instructions, (record, p. 38,) very fully and accurately informed them as to the legal effect of constructive notice of fraud and of what it consisted. That the jury took the narrow and technical view of plaintiffs' said admission, suggested by counsel on argument in the court of appeals, and shut their eyes to the plain direction of the court, as contained in the instructions, is hardly supposable.

FIFTH.

EXCEPTIONS TO INSTRUCTIONS.

Numerous errors were assigned in the circuit court of appeals, arising out of the instructions to the jury, but only a few, comparatively, of the exceptions are relied on here, and we will notice them in the order in which they are presented in the assignment of errors in this court.

FIRST—It was contended in the court of appeals, (and we suppose it will be insisted on here,) that the trial judge, erred in the fifth instruction, in this, that the jury were therein told that it devolves upon him who alleges fraud to show the same by *satisfactory* proof.

Counsel for defendants cited in support of this contention, *Field v. Kinnear*, 5 Kan. 233. We do not consider the case decisive of the question. It is true, the trial court in that case had, in instructing the jury, told them that they must be *reasonably satisfied* before they could be justified in returning a verdict. The trial court having sustained a motion for a new trial and set aside the verdict, the case was before the supreme court to review its action in so granting a new trial, and in the opinion, it is in substance said by *Mr. Justice* Valentine, among other things:

That the instructions to the jury were not erroneous, except, perhaps, in this: that in those portions of the charge which were most favorable to plaintiff, the court by going into details and by repetitions, made the charge seem altogether too favorable to plaintiff. And the court also used the

word *satisfied* in its charge, in a way, which, if understood by the jury in its technical sense, would certainly mislead them.

After stating that, to be *satisfied* of the truth of a fact, is to have every reasonable doubt of its truth removed from the mind, the learned judge goes on to say:

That in popular language, this word probably has a border signification; but taking the whole charge together, the jury may have given it the more restricted signification, and thereby have been misled. The court below substantially found that the jury was so misled, and we will not disturb that finding, unless it clearly appears that the finding and order were erroneous.

If this Kansas case had been one, in which the proof of fraud was involved, and the only objection to the instructions was in the use of the word "satisfied," and the trial court had sustained the instructions by overruling the motion for a new trial, it is by no means certain that the supreme court would have interfered.

Generally, it may be considered as settled, that fraud is never presumed, and it is accordingly held, that it must be established by evidence. Courts and text writers have used various expressions in the statement of this proposition,—such as, fraud must be *clearly* and *distinctly* proved; fraud must be proved by evidence, so *clear* and *strong* as to produce *satisfactory* conviction; the evidence must be *clear, précise* and *indubitable;* the jury should not be permitted to find fraud on vague, slight, or uncertain evidence, although they may think it fairly and fully *satisfies* them; if the evidence is sufficient to *satisfy* the mind and conscience of the existence of fraud, it will suffice, though it does not lead to a conviction of absolute certainty, and other like expressions, by which, is

meant, as we understand it, that the jury should be content, after having considered the evidence, that the fraud exisits, and not, that it must be made out by that profound and unmoving conviction required in criminal cases, which is usually expressed in the words, *satisfied beyond all reasonable doubt.*

"A man who alleges fraud must *clearly* and *distinctly* prove the fraud he alleges, * * * If the fraud is not *strictly* and *clearly* proved, as it is alleged, relief cannot be had, * * * Fraud will not be carried by way of relief one tittle beyond the manner in which it is proved to the *satisfaction* of the court.— Kerr on Fraud and Mistake (Bump's Ed.) 382, 383.

"A man who alleges fraud must *clearly* and *distinctly* prove it, * * * If the evidence is sufficient to *satisfy* the mind and conscience of the existence of the fraud, it will suffice, although it do not lead to a conviction of absolute certainty."—8 Am. and Eng. Ency. of Law, 654, 655, (text).

Under the head *Amount of Proof*, Bump says:

"While the law abhors fraud. it is also unwilling to impute it on slight and trivial evidence, and thereby cast an unjust reproach upon the character of the parties. Such an imputation is grave in its character and can only be sustained on *satisfactory proof.*" —Bump on Fraudulent Conveyances (third Ed.) 603,

Again, the same author says:

"What amount or weight of evidence is sufficient proof of a fraudulent intent is not a matter of legal definition, * * * The only legal test applcable to it upon such an issue is its sufficiency to *satisfy* the the mind and conscience and produce a *satisfactory* conviction or belief. The *proof*, however, must be *satisfactory.*"—Id, 604.

"Fraud must be proved by evidence so *clear* and *strong* as to produce *satisfactory* conviction."—*Greer v. Caldwell*, 14 Ga. 207.

When it is proposed to impeach a release, on the ground of fraud, the evidence thereof should be *clear, precise*, and *indubitable.*"—*Biern's Appeal*, 92 Pa.St.265; *Cummins v. Hurlbutt*, Id. 165.

"Allegations of fraud should always be *clearly* proved, either directly or necessarily, by circum-

stances, which *clearly* lead the mind of the court to the conclusion that a fraud has been perpetrated."—Drummond, C. J., in *Babbitt v. Dotton*, 14 Fed. Rep. 19.

In *Lynn v. B. O. R. R. Co.*, 60 Md. 413, the court says:

"The jury were then told by the second instruction that the *onus* of establishing the fraud or bad faith mentioned in the prayer, is on the plaintiff; that the presumption is always against fraud, and that it is not to be assumed on doubtful evidence, but the facts constituting it must be *clearly* and *satisfactorily* established. This is simply a statement of an elementary principle every where conceded, and recognized in all the authorities. There was clearly no error in announcing it to the jury in this case."

In *Marksbury v. Taylor*, 10 Bush. (Ky.) 524. the court says:

"The chancellor, like a jury, must have such evidence as *satisfies* the mind to a reasonable degree that fraud has been committed, before he is justified in finding its existence."

In Bigelow's Law of Fraud, (1888,) the author under the head, BURDEN OF PROOF, says,

"He (him who alleges it,) must prove the fraud, which means that he must show it by *clear* and *satisfactory* evidence, such as will preponderate over presumption."—p. 123.

Again, this author, in the same work, at p. 145, says,

"But while it is not necessary, in order to sustain an allegation of fraud, that the evidence should be so decisive as to leave no doubt, unless it be in a case of an attempt to overturn a writing, the rule requiring *clear* and *satisfactory* evidence appears to mean more than is meant by *satisfactory* evidence of other facts not involving turpitude. There is, it seems, in the case of a charge of fraud a presumption of honesty to overcome, and stronger evidence will accordingly be required than would be neccessary in a case in which no presumption to be met existed."

"The *quantum* of evidence necessary to establish a fraudulent purpose is not a matter of exact legal definition. Evidence which will *satisfy* men of sound

judgment and fair discernment is usually regarded as sufficient; in other words, *proof* should be *satisfactory*, not irresistible, and not beyond a reasonable doubt." —2 Rice on Evidence, p. 953.

"It is not error to instruct the jury on an issue of fraud against creditors in a conveyance, that the fraud must be established to their *satisfaction*."—*Frankenthal v. Goldstein*, 44 Mo. App. 189.

In *Hatch v. Bayley*, 12 Cush. 30, it appears that the trial court had instructed the jury, that it was necessary that defendant should adduce stronger proof, to establish fraud, etc., than is necessary to prove a debt or a sale; that the presumption was, that every man conducted honestly without fraud; and when fraud was alleged, the proof must not only be sufficient to establish it, but to overcome the presumption of honesty. As to the objection to this instruction, the supreme court, by Shaw, C. J., said,

"As we understand it, the judge intended to say, that he who alleges fraud against another, is bound to prove it. That every man is presumed to act honestly until the contrary is proved; that he who charges another with moral turpitude or legal delinquency, must prove it; that as this is an allegation against a presumption of fact, it requires somewhat more evidence than if no presumption existed. It carried no direction as to the amount of evidence required, or as to the nature of the evidence, whether positive or circumstantial, but only that, on the whole, it must be somewhat stronger; and we cannot perceive that such a diretion is incorrect. THE ORDINARY DIRECTION TO THE JURY IS, that he who charges fraud must *prove* it to the *satisfaction* of the jury. We think it not contrary to any rule or principle of law for the judge to inform the jury, that as the charge of fraud is a charge against a presumption of fact, perhaps often a slight one, yet the jury, in order to be *satisfied*, might require somewhat stronger evidence, than would suffice to prove the acknowledgement of an obligation, or the delivery of a chattel."

In *Fick v. Mulholland*, 48 Wis. 413, 4 N. W. Rep. at bottom of p. 528, the court says: "It is elementary

that fraud must be proved by *clear* and *satisfactory* evidence."

In *Baughman v. Penn*, 33 Kan. 504, 508, objection was made to the direction of the trial court, wherein the jury were told, "that fraud is never presumed, but must be established by evidence." Of the correctness of this proposition, the supreme court said there should be no question, and that court, in the same connection, further said,

"Fraud is not so lightly imputed. While certain circumstances will give rise to an inference of fraud, yet the law never presumes it. It devolves on him who alleges fraud to show the same by *satisfactory proof*."—33 Kan. 508.

In *Jones v. Simpson*, 116 U. S. 609, which was like the case at bar, and was in error to the circuit court for the District of Kansas, this court expressly adopted and approved the language above quoted from the opinion of the supreme court of Kansas in the *Baughman* case.

Bouvier, in his Law Dictionary, (14th Ed.) in defining the term "satisfactory evidence" says, "it is that evidence, which is sufficient to induce a belief that the thing is true; in other words, it is credible evidence."

In the Century Dictionary, "satisfactory evidence" or "sufficient evidence," is defined to be "such evidence as in amount is adequate to justify the court or jury in adopting the conclusion in support of which it is adduced."

And so, we might cite expressions of the like, from text writers and courts, without end. It is, we believe, sufficiently shown by the foregoing, that the courts and authors do not, generally, in this connection, give to the expressions, *clear evidence*, *satisfactory proof*, etc., the technical and restricted sense put upon them in some of the cases cited in defendants' argument in the circuit court of appeals,

and we think it equally evident, upon an examination of the instructions as a whole, that it was in no such narrow sense, that the learned trial judge used the term "satisfactory proof" in this case, and that the jury did not so understand it.

We admit that expressions are used in some of the cases hereinbefore cited, which are perhaps too strong, but we do not think the term "satisfactory proof" is necessarily so.

Judge Bigelow, in his splendid treatise on the Law of Fraud, (1888,) in note (3) p. 142, says:

"The language of *Cummins v. Hurlbutt*, (92 Pa. St. 165,) in declaring that the evidence must be 'indisputable' and that of *McShane v. Hazelhust* 50 Md. 107, that there must be 'clear and conclusive proof,' is incautious and too strong. The language of *Ruff v. Jarrett*, 94 Ill. 475, in objecting to the word 'satisfactory' of the required evidence, goes too far the other way."

Giving to this instruction then, a reasonable interpretation, it seems to us to be in accordance with the weight of authority. And, that instructions are to be so interpreted, see, *First Unitarian Society v. Faulkner*, 1 Otto, 415.

In our judgment, the most that can be fairly said against the instruction in question is, that it may possibly be open to verbal criticism, but if so, that ought not reverse the judgment.

In Thompson, on Charging the Jury, Sec. 126, the author says:

"All courts will agree upon the proposition that a judgment ought never to be reversed on account of the giving of an instruction which was obnoxious to verbal criticism merely; for if an appellate court should reverse judgments upon such a criticism of instructions, it would probably reverse every judgment in cases where any instructions were given."

We have an apt illustration of this proposition in the case of *Galpin v. Wilson*, 40 Ia. 90, which case, as it seems to us, is, in principle, directly in point

here. In that case, the plaintiff asked a series of instructions, all of which were refused. The trial court gave instructions, to some of which plaintiff objected. Exceptions were duly taken. The first instruction asked by plaintiff, was as follows:

"Fraud is never to be presumed, but must be *satisfactorily* proved by some kind of *satisfactory* evidence, either circumstantial or direct."

This being refused, the court gave the following:

"Fraud is not to be presumed, it must be proven; but like every other fact, may be found from circumstances."

The supreme court said:

"The only difference in the instruction asked and the one given consists in the word *satisfactory*. This difference is merely in words and not in the essential meaning of the two. The jury could not find that fraud was proven, unless they were *satisfied* of of the fact from the evidence. If an appellate court should reverse judgments upon such criticism of instructions, it would probably reverse every judgment, in cases in which instructions were given."

But the objection to that part of the charge now urged, cannot avail defendants here, even if the language criticised is objectionable; because the exception relied on was general and to the whole instruction, a portion of which, undoubtedly announces a correct proposition of law and is not open to criticism.

The instruction in full and the exception thereto, as contained in the bill of exceptions, (record, pp. 36, 37,) is as follows:

"FIFTH—Parties to a business transaction are not presumed, however, to deal with each other in bad faith, but on the contrary, are presumed to deal honestly and in good faith until the opposite is shown by the evidence upon the trial, and any one who alleges that such acts are done in bad faith, or for a dishonest and fraudulent purpose, takes upon himself the burden of showing that such is the case. In other words, fraud is never presumed, *and it devolves upon him who alleges fraud to show the same by satisfactory proof*,

i. e., proof to the satisfaction of the jury. To the giving of which defendants duly excepted at the time."

That portion of the instruction, not italicised by us, is, we submit, absolutely free from verbal or other criticism, whatsoever. It is, in substance, the language universally employed at *nisi prius* in charging juries in like cases. It is not essentially different from the charge given in *Baughman v. Penn*, which was approved by the supreme court of Kansas, and also by this court in *Jones v. Simpson*, *supra*, and which was as follows:

"The law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose, and any one who alleges that such acts are done in bad faith, or for a dishonest and fraudulent purpose, takes upon himself the business of showing the same."—33 Kan. 508.

If counsel was of the opinion, at the trial, that the particular part of the charge, italicised by us, was too strong and calculated to mislead the jury, as he now contends, it was his duty to call the court's attention to it at the time, and ask that it be modified, or stricken out altogether. This was not done. A portion of the charge being unobjectionable, it was, in justice to the court, counsel's duty to do this. If it was supposed that, by adopting in this charge, language used by the supreme court of Kansas in a like case, (33 Kan. 508,) the jury might receive a wrong impression as to the degree of proof required to establish fraud; that the expression "satisfactory proof" was too narrow in its meaning, and likely to be misunderstood by the jury, then counsel could well have requested further, or more explicit instructions on the point; and then, had the court refused, the objection would be better entitled to consideration here.—*Castle v. Bullard*, 23 How. 172; *Congress and Empire Spring Co. v. Edgar*, 9 Otto, 645.

As has been shown, the exception here, was gen-

eral and to the *whole* of the instruction, and the portion of the charge, now criticised and urged as misleading, was not selected and pointed out on the trial. The judge's attention was not specially called to that feature of the instruction now claimed to be erroneous, as should, in all fairness, have been done; and therefore, if it be conceded that, as to so much of the charge,it was misleading and prejudicial to defendants, still they were in no position to take advantage of it in the circuit court of appeals, and consequently, in no better position here. The exception, being to the whole instruction, a portion of which is conceded to be sound law—is bad, within the *tenth* rule of the United States Circuit Court of Appeals for the Eighth Circuit. As saved, this exception does not come within the spirit, intent and purpose of such rule, as explained and interpreted by that court, in the case of *Price v. Pankhurst*, 53 Fed. Rep. 312, 314, where it is said:

"It matters not that the judge may be willing to consent to such a bill. He cannot waive the rule, so far as it relates to specific exceptions, if he desires to do so. The rule is not made for the judge's personal protection or benefit, but for the protection of suitors and the advancement of justice. It is the duty of the party excepting, to call the attention of the court distinctly to the parts of the charge he excepts to, and this must be done before the case is finally submitted to the jury, to the end that the court may have an opportunity to correct or explain the parts of the charge excepted to, if it seems proper to do so. * * * The party who conceives the charge is erroneous in any respect, and remains silent, will not be heard to point out the error after trial; and a general exception to the whole charge, any part of which is good law, is equivalent to silence. The rule is mandatory. Its enforcement does not rest in the discretion of the lower court. Its enforcement is essential to the proper and intelligent administration of justice. It serves to correct hasty, inaccurate, or misleading expressions in the charge; it affords an opportunity for explanations and qualifications

which might otherwise be overlooked, and sometimes, by removing the ground of exception, prevents further litigation."

In line with this interpretation of its tenth rule, the same court, in *Railway Co. v. Johnson*, 54 Fed. Rep. 474, 481, in speaking of an exception to a paragraph of the charge to the jury, said:

"This paragraph of the charge was excepted to as a whole. It stated the law accurately in two or three aspects of the proof. The rule is well settled that where the charge, or any part of it, which contains two or more distinct propositions of law, is excepted to generally, the exception will be overruled if any one of the propositions of law it contains is unobjectionable."

In *Railroad Co. v. Varnell*, 98 U. S. 479, 485, this court said:

"Where the charge of the judge to the jury is of a character to mislead the jury, the error is one of law, and may be corrected in an appellate court; but in every such case the part of the charge to which the exception is addressed ought to be distinctly pointed out. Unless that be done, the exception cannot be sustained as a ground for reversing the judgment."

In one of the instructions, in the case just cited, reference was made to the evidence and comments by the judge of a general character followed, at the close of which, counsel excepted thereto in the following language: "To which instruction the counsel for defendants then and there excepted." This court in passing upon this exception said, "Discussion of that exception may well be omitted, as the remarks made in respect to the preceding exception are believed to be sufficient to show that it is not sufficiently explicit, and that it must be overruled."

"One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it should be

proper to do so."—*Mr. Justice* Hunt, in *Beaver v. Taylor*, 93 U. S. 46.

In *Railway Co. v. Jurey*, 111 U. S. 584, the judge had instructed the jury that "the measure of damages would be the value of the cotton in New Orleans, where it was to have been delivered, together with interest on said sum at *eight* per cent per annum from the time when the cotton ought to have been delivered." The error alleged was, that the rate of interest should have been placed at *five* per cent. This court said:

"Conceding that the charge in respect to the rate of interest was erroneous, the judgment should not be reversed on account of the error. The charge contained at least two propositions: first, that the measure of damages was the value of the cotton in New Orleans, with interest from the time when the cotton should have been delivered; second, that the rate of interest should be eight per cent. It is not disputed that the first proposition was correct. But the exception to the charge was general. It was, therefore, ineffectual. It should have pointed out to the court the precise point of the charge that was objected to. 'The rule is, that the matter of exception should be so brought to the attention of the court, before the retirement of the jury to make up their verdict, as to enable the judge to correct any error if there be any in his instructions to them.'"

We therefore, submit, that within the spirit and reasoning of the foregoing authorities, the error under consideration was not properly saved by the bill of exceptions, if, indeed, it be error at all.

SECOND—The sixth instruction was excepted to and is next assigned here as error. The instruction is as follows:

"SIXTH—Fraud may be shown, however, by circumstances; but the circumstances must be of such a character and so connected with the transaction in question as to lead the mind naturally to infer that the alleged fraud has been perpetrated by the parties to the transaction."—Record, p. 64.

In his brief in the circuit court of appeals, counsel for defendants cited no authorities in support of this exception and urged it no further than to say that this instruction was erroneous for the same reasons that made the fifth instruction (the one we have just considered) error; and for the further reason, that the jury were not therein expressly told that it was only necessary to show that plaintiffs had knowledge of sufficient facts to put a prudent man on inquiry.

As to the first ground of objection, stated, we have only to say, that, the reasons assigned in support of defendants' objection to the fifth charge, do not seem applicable to this one; and as to the objection that it does not in terms tell the jury that *knowledge of facts sufficient to put one on inquiry, is enough*, we have to suggest, that the jury were told all about this in another instruction, which is quite sufficient for the purpose.

This instruction, we believe, is the one commonly given concerning the proof of fraud by circumstances, and is undoubtedly proper, in view of the well settled proposition that, fraud is never to be presumed; that it is not to be lightly imputed, but must be proved.

"Fraud is never presumed; and where it is alleged the facts sustaining it must be clearly made out."—*Farrar v. Churchill*, 135 U. S., 609, 621.

Circumstantial evidence consists in reasoning from facts which are proved, to establish such as are conjectured to exist; and to be sufficient, it must be such as to naturally lead the guarded discretion of a reasonable and just man to the conclusion sought to be established, or, putting it in the language of the supreme court of New York, "the fact (sought to be proved) may be (thus) established as a deduction from the other facts *naturally* and *logically* indicating

its existence."—*Pease v. Batten*, 56 Hun., 643, 9 N. Y., Supp. 621.

"The latter (circumstantial evidence) is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency, from the laws of nature, the usual connection of things, the ordinary transaction of business, etc., to lead the mind to a conclusion that the fact exists which is sought to be established."—2 Rice on Evidence, p. 764, Sec. 317,

And again, the same author, in speaking of circumstantial evidence, says:

"Hence, each fact necessary to the inference must be distinctly and independently proved by competent evidence; and the inference must be fair and *natural*, not forced or artificial."—Id, p. 767.

In passing upon the question of the proof of fraud by circumstantial evidence, the court of appeals of New York, said:

"Fraud is to be proven and not presumed. It is seldom, however, that it can be directly proven, and usually is a deduction from other facts which *naturally* and logically indicate its existence. Such facts, nevertheless, must be of a character to warrant the inference. It is not enough that they are ambiguous, and just as consistent with innocence as with guilt. That would substitute suspicion as the equivalent of proof. They must not be, when taken together and aggregated, when interlinked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting."—*Shultz v. Hoagland*, 85 N. Y., 464, 467.

Defendants asked no instructions on this branch of the case, and did not suggest to the court at the trial, wherein this charge was too favorable to plaintiffs, nor suggest its modification in any particular.

THIRD—The eighth instruction was excepted to, and is next in order, as contained in the assignment of errors in this court. It is as follows:

"EIGHTH—The inadequacy or insufficiency of the price paid when a sale takes place will be considered by you in determining the good faith of the parties.

An inadequate price, however, if you should find that an inadequate price was paid in this case, is not necessarily decisive, but is simply to be viewed as a circumstance when it exists, of greater or less weight according as the inadequacy may be great or small. The mere fact that a sale of merchandise was not made in the usual and ordinary course of business will not necessarily invalidate the sale, but you should weigh this as a circumstance in determining the good faith of the parties, if you find that the sale in question was an unusual one or not made in the ordinary manner."—Record, p. 64.

The exception to this instruction was general and to the whole of it, and all counsel for defendants had to say in his brief in the circuit court of appeals on this point was, that:

"In the *eighth* instruction, instead of instructing the jury as it did, the court should have stated that the inadequacy of price was a badge of fraud, and should also have stated that the fact that the sale was made, if it was so made, in an unusual and out of the ordinary manner, was also a badge of fraud."

Counsel cited no authorities in support of this contention, and beyond the assertion, here quoted from his brief, made no attempt to point out to the court of appeals how, or wherein the difference, in the phraseology of the charge as given and that suggested by himself, was prejudicial to defendants.

If counsel was of opinion at the trial that it would make any material difference for the court to adopt in this charge, the language since suggested by him, why did he not then suggest it by requesting an instruction to that effect, or in some other manner bring it specially to the court's attention? By so doing, a reconsideration of the charge with the very matter in view would have been secured, resulting, no doubt, in a revision of the instruction, if thereupon, the court should have deemed it proper.

In view of the usual press of business and the hurry common to the trial of causes at the circuit, it is idle to suppose and unreasonable to expect the

trial judge to weigh with fine scales his charge to the jury. He cannot deliberate upon and select with nice care the language he shall use in the instructions. He can only endeavor to acquaint the jury in such language as suggests itself to him at the moment, with the law governing the case. And so, it has been held by this court that:

"Instructions given by the court at the trial are entitled to a reasonable intepretation, and if the proposition as stated is not erroneous, they are not, as a general rule, to be regarded as incorrect on account of omissions or deficiencies not pointed out by the excepting party."—*Spring Company v. Edgar*, 99 U. S. 645, 659.

And for like reason, it is held, that a party who is dissatisfied with a charge because ambiguous, should request to have it made clear before the jury leave the box.—*Rld. Co. v. Munson*, 14 Wall. 442. And, that, where there are no requests for an instruction, though proper, it is not reversible error for the court to fail to give it.—*Express Company v. Kountze*, 8 Wall. 342; *Shutte v. Thompson*, 15 Wall. 151; *Hall v. Weare*, 92 U. S. 728. And, that, this court will not consider whether the language used in the charge was technically accurate or not.—*Bridge Company v. McGrath*, 134 U. S. 260, 276. And, that a nice criticism of words will not be indulged when the meaning of the instructions is obvious.—*United States v. Conklin*, 1 Wall, 644, 654; *Rld. Co. v. Mackey*, 157 U. S. 72, 86, 87.

The jury in this case were told, as we have seen, by the sixth paragraph of the charge, that fraud may be shown by circumstances; and, in this one, the court expressly presented to them the fact or circumstance of inadequacy of price, as well as the circumstance of a sale made out of the usual course of business, for their consideration in determining the question of good faith of the parties. The jury were

thus specially directed that these were facts or circumstances, if found to exist, proper to be taken into view by them in arriving at their verdict. This we believe to be a sufficiently full, accurate and fair presentation of the matter to the jury, and especially so, in the absence of any requests whatever upon the point.

In the circuit court of appeals, defendants practically conceded the correctness of that portion of the charge, wherein, the jury were told that inadepuacy of price as well as the fact of a sale being made out of the ordinary course of business, would not necessarily be decisive of the question of the validity of the sale; and we suppose it will likewise be conceded here. At any rate, upon the authorities, there can be no question about it. A portion of this charge then, being unexceptionable, and the exception thereto being general and to the whole of it, further consideration of the error assigned thereon, might well be dismissed from the case.

But as we have said, we believe the charge is fair, and in view of the authorities, is, on the whole, good law.

In *Goddard v. Weil*, 165 Pa. St. 419, 30 Atl. Rep. 1000, the second error assigned was, that the trial court erred in its answer to the defendants' third point, which was as follows: "If the jury find that the property covered by the bill of sale was worth $5,200, or thereabouts, and that the total indebtedness of Black (vendor) to Goddard, Hill & Co. (vendees) did not exceed $3,710, then they will be justified in inferring from this fact that the sale was not absolute and unconditional; and, if they so concluded, the alleged sale was fraudulent and void in law, and the verdict must be for (Black's execution creditors) defendants.—Refused."

The supreme court said as to this, "It would have

been error to have affirmed the defendants' third point, the refusal of which is the subject of the second assignment of error. Mere inadequacy of price was not sufficient ground for the inference that the sale was not absolute and unconditional. It was a matter proper for the consideration of the jury, in connection with the other facts of the case. *Gross* inadequacy of price, standing alone, as the only fact established, might justify such an inference; but here the inadequacy was to be taken in connection with the other facts, and the conclusion was to be drawn from all of them."

In *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. Rep. 804, it was held, that, "mere proof of inadequacy of price by itself is insufficient to implicate the vendee in the fraudulent intent of the vendor, and that inadequacy of price, unless *extremely gross*, does not *per se*, prove fraud. That it must appear that the price was so manifestly inadequate as to shock the moral sense, and create at once upon its being mentioned a suspicion of fraud."

In the late case of *Mathews v. Reinhardt*, (Sup. Ct. Ill. 1894,) 37 N. E. Rep. 85, 88, it is said:

"The general rule is, that the mere inadequacy of price is not of itself a ground for setting aside a transfer of goods as fraudulent. Yet the inadequacy *may be so great* as to amount of itself to evidence of fraud."

In *Follett v. Rose*, 3 McLean, 332, the court held that "unless the inadequacy of consideration be so *gross* as to strike every one with a presumption of fraud, it is not evidence of unfairness."

And, this court, in *Kempner v. Churchill*, 8 Wall. 362, said: "It is true, that mere inadequacy of consideration, unless *extremely gross*, does not *per se* prove fraud."

"Mere proof of inadequacy of price, by itself, has been considered insufficient to implicate the vendee

in the fraudulent intent, or to impeach his good faith; and inadequacy of consideration, unless *extremely gross*, does not *per se* prove fraud. It must appear that the price was so manifestly inadequate as to shock the moral sense, and create at once, upon its being mentioned, a suspicion of fraud."—Waite, Fraud, Conv., Sec. 232.

"While inadequacy of price is never alone sufficient to establish fraud, yet it may often be shown along with other evidence as tending to show fraud."—*Douthitt v. Applegate*, 33 Kan. 396.

We conclude then, that mere inadequacy of price, when shown, is at most only a circumstance to be weighed by the jury, along with the other facts in the case, in determining the question of good faith.

With reference to the latter clause of this instruction, we have to say, that the jury were clearly told that a sale made out of the usual course of business should be considered by them in determining the good faith of the parties to it. The import and meaning of this, could not well be misunderstood to the prejudice of the defendants.

On the whole, the court, in this instruction, came as close to an accurate statement of the law governing the matter in hand, as is usual for trial courts to do; and to set aside a judgment upon a criticism such as that indulged in by counsel with reference to this charge in the circuit court of appeals, would set a precedent, making instructions to a jury equivalent to reversible error, in nine cases out of every ten.

In *Davis v. Getchell*, 32 Neb. 792, 49 N. W. Rep. 776, which was an action in replevin by the purchaser of a stock of goods against the sheriff, who had siezed them under writs of attachment against the seller, there was evidence tending to show that the goods were sold to plaintiff at a price much below their value. The trial court refused a special instruction asked by defendant as to the effect of inadequacy of price, because, as requested, it was inaccurate

and too strong. The court, however, failed to modify the instruction or give any in place of it, wherein the point was specifically called to the jury's attention, and no where in the charge given was the jury told that inadequacy of the price paid was a circumstance to be considered by them in determining the question of the good faith of the sale. It was only in a general way, together with other facts and circumstances which might throw light on the transaction, that the attention of the jury was called to it at all. The supreme court said, that the instructions might well have gone farther than they did; but that the failure of the court to make them more explicit and comprehensive, was not reversible error. We cite this case here, simply to show that the supreme court of Nebraska did not deem it necessary to reverse a judgment in a case like the one at bar, where the fact of the inadequacy of price, though in the case, was only called to the attention of the jury by a general instruction, that they should consider all the circumstances and facts in the case in making up their verdict.

FOURTH—A general exception was saved to the giving of the tenth paragraph of the court's charge, and it is the basis of the last alleged error in the instructions given, as set forth in the assignment of errors in this court. The instruction as contained in the record, is as follows:

"Tenth. In determining whether the sale in question in this case was made in good faith or for the purpose of defeating Cannon's creditors you should take into account the intentions and motives of both parties to the sale—that is, the purposes and intentions of Collins and Bretch and Cannon. If you should be satisfied from the evidence in the case that it has been shown that in making the sale to the plaintiffs Cannon intended to defraud his creditors, yet if, on the other hand, you should find that the plaintiffs had no intention of participating in the

fraud or to aid or assist Cannon in carrying out such fraud, in such case you should find for the plaintiffs. In other words, to render this sale void as to creditors both seller and buyer must have acted in bad faith, and if the plaintiffs bought from Cannon in good faith they took a good title, whatever may have been Cannon's intention in effecting the sale." —Record, p. 64.

In the first clause of this instruction, the jury were told that, in determining whether the sale in question was made in good faith or for the purpose of defeating Cannon's creditors they should take into account the intention and motives of both parties to the sale. That this was a proper direction to the jury, we suppose will go without question. It must be so, since to make a sale there must be both a seller and buyer; and to make the validity of a sale, turn upon the motives of the vendor alone, would make the hazard of a purchase so great as to discourage if not entirely destroy commerce. When, therefore, the jury were further told, in the close of the instruction, that if the plaintiffs bought from Cannon in good faith they took a good title, whatever may have been Cannon's intention in effecting the sale, they were rightly directed in the law, as settled by the weight of authority.

It was said by this court in *Horbach v. Hill*, 112 U. S. 144, that:

"The fraud which will vitiate a sale must be mutual, that is, must be intended by both parties thereto, or else by one and acquiesced in and furthered by the other, with knowledge of the former's fraudulent purpose."

In *Priest v. Brown*, 100 Cal. 626, 35 Pac. Rep 323, the court said:

"The title of a purchaser in good faith of the land of an insolvent debtor is not affected by the fact that the debtor in making the conveyance intended to defraud his creditors."

In *Benson v. Maxwell*, (sup. ct. Pa, decided May

14, 1888—not officially reported,) 14 Atl. Rep. 161, 163, 164, plaintiff assigned error on the trial court's answer, affirming defendant's first point, which was:

"Fraud is never presumed, but must be proved by the party alleging it; and, in order to avoid a deed, it is not enough to show that the vendor intended to hinder, delay, or defraud his creditors, but it must also be shown to the satisfaction of the jury that the vendee received the deed with like intent to hinder, delay, or defraud the creditors of the vendor."

The supreme court by Paxson, J., said in this case, that a careful examination of the specifications of error, involving the charge of the court and the answers to the points, failed to disclose any rulings that could be fairly criticised.

It *Beasley v. Bray*, 98 N. C. 266, 3 S. E. Rep. 497, the court said that:

"In order to impeach an absolute conveyance on the ground that it was made for the purpose of hindering, delaying and defrauding creditors of the vendor, it must appear that the vendee participated in the fraud."

In *Fraser v. Passage*, 63 Mich. 551, the court said:

"To render a conveyance void for fraud upon creditors, it is necessary that the grantee should have knowledge of, and in some way participate in the fraud."

In *Schroder v. Walsh*, 120 Ill. 403, 11 N. E. Rep. 70, complaint was made of appellee's ninth instruction, which, in substance, told the jury that, while fraud might be proved by circumstances, yet the appellee must have participated in or have been a party to the intent to defraud his vendor's creditors in order to invalidate his title to the goods. The supreme court approved of the instruction, and said:

"In order to render a sale or conveyance fraudulent as to creditors of the vendor, there must be a mutuality of participation in the fraudulent intent on the part of both the vendor and the purchaser."

In *Farlin v. Sook*, *Mr. Justice* Brewer said:

"We think the conclusions of the district court are correct; that this is a case of an alleged fraudulent sale, and that participation in the fraud on the part of the grantee, or at least knowledge of the intended fraud of the grantor, must be shown, or the sale will be upheld. This is the general doctrine as to ordinary fraudulent sales recognized by the decision of this and other courts. * * * In *Fifield v. Gaston*, 12 Ia. 218, the court says: 'A fraudulent purpose on the part of the grantor is not sufficient. A like intention must be traced to the grantee, and unless shown, the conveyance will be upheld'; and so run the authorities generally."—30 Kan. 404.

But the real point of the objection, as urged in the circuit court of appeals, was, that the judge should have incorporated in this instruction, (and it seems that counsel thinks it should have been made a part of each paragraph of the charge) the rule of law concerning constructive notice of fraud; and for the purposes of his argument in that court, counsel detached that portion of the charge wherein the court said, that even if Cannon acted fraudulently, yet if, on the other hand the jury should find that the plaintiffs had no intention of participating in the fraud or to aid and assist Cannon in carrying out such fraud then they should find for plaintiffs—and contended thereon, that the court erred, because it was not necessary that plaintiffs should have actually *participated* in the fraud of Cannon, but that it was enough if they had knowledge of facts sufficient to put them on inquiry. In other words, counsel insisted, as we have said, that the rule of law concerning constructive knowledge of fraud in sales should have been included in, and made a part of this paragraph of the charge, and that because it was not, the instruction was fatally erroneous.

It may be that this particular language of the

charge, general, as it is, standing alone without explanation or qualification, might mislead, as suggested; but when considered in connection with the other portions of the instruction, and together with the eleventh and twelfth parapraphs of the charge, immediately following, it could hardly have had that effect.

General language in a charge which might have misled separated from the context, but not when considered in proper connection with the rest of the instruction, is not ground for reversal.—*Northern Pac. R. R. Co. v. Babcock*, 154 U. S. 190, 201.

This paragraph of the charge was given for the single purpose of directing the jury as to the rule of law which requires, that in order to invalidate a sale on the ground of intended fraud on the part of the vendor, the vendee must also be implicated therein; and as that was the particular office of the instruction, the court was not required to immediately couple with it a direction on the law of notice, actual or constructive, or to incorporate therein all the limitations and qualifications arising out of the law governing fraud with reference to the conveyance of property. It was enough, if the legal effect of notice of such fraudulent intent of the vendor or what is the same thing, of knowledge of facts sufficient to put the vendee upon such notice, was afterwards fully and clearly presented to the jury in other portions of the charge.

As was well said by the supreme court of Texas in the late case of *Freiberg v. Johnston*, 71 Tex. 558, 9 S. W. Rep. 455, 458, "It cannot be reasonably expected that the trial judge will, in every paragraph of a lengthy charge, announce all the principles of law applicable to every issue and phase of the case pre-

sented by the pleadings and evidence; nor will it be presumed, in the absence of anything to support such presumption, that the jury considered any particular paragraph of the charge to the exclusion of all others."

Immediately following the instruction in question, the court further charged the jury as follows:

"Eleventh. If Cannon bought the goods in question, or any of them, upon false statements, or if he bought such goods with the intention of selling them without paying the parties from whom he bought them, that would make the sale fraudulent so far as Cannon is concerned, but, in the absence of any notice of such facts to the plaintiffs, they would not be affected thereby, and the sale would not thereby be void as to them."—Record, p. 38.

"Twelfth. Actual knowledge by the plaintiffs of the fraudulent purpose of Cannon was not necessary in order to vitiate the sale. The knowledge of facts sufficient to excite the suspicions of a prudent man and put him upon inquiry is in law equivalent to knowledge of the ultimate fact. If, therefore, you are satisfied from the evidence in this case that the plaintiffs made the purchase in question under such circumstances as to arouse the suspicions of a man of common sagacity, and to put a prudent man upon inquiry as to the purposes of Cannon in making the sale to them, and that instead of making any inquiry they omitted or neglected doing so, then you would be justified in holding them chargeable with knowledge of all the facts which due inquiry would have developed."—Record, p. 38.

It will thus be seen that the paragraph of the charge complained of under this assignment, considered with reference to the instructions just quoted, could not possibly mislead the jury in the manner suggested.

We believe it is agreed by most, if not all the courts, that instructions to the jury must be taken together, and that it is unnecessary to insert in each separate charge all the exceptions, limitations and conditions which are contained in the instructions

as a whole. This rule is well stated in the case of *Spring Company v. Edgar*, 9 Otto, 645, 659, by *Mr. Justice* Clifford, where he says:

"In examining the charge of the court, for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages and to decide upon them, without attending to the context or without incorporating such qualifications and explanations as naturally flow from other parts of the instructions."

Following this rule, this court has held that, a clause in a charge which, in connection with the entire charge, could not have misled the jury, is not a ground of error.—*Aetna Life Ins. Co. v. Ward*, 140 U. S. 76. And, that where, taking all the instructions together, of the court to the jury, they conform to the well settled law and there is no ground for supposing that the jury had been misled, the judgment will not be reversed by reason of the instructions.—*Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383.

In *Pray v. Cadwell*, 50 Mich. 222, 15 N. W. Rep. 92, 93, the court said:

"The accuracy of a charge in point of law is to be decided upon the consideration of the whole and not upon a view of detached passages or isolated expressions, and where an excepting party imagines a remark to be questionable and makes no effort to have it corrected or explained, the court will not be inclined to sustain the objection unless fully satisfied that the justice of the case requires it."

The supreme court of Kansas has said: the whole charge is to be construed together.—*Gillett v. Corum*, 7 Kan. 156; *Lawder v. Henderson*, 36 Kan. 754; *Cain v. Wallace*, 46 Kan. 139; when the court has once given the law on a point, it is not necessary to repeat it, —*Insurance Co. v. Berry*, 8 Kan. 159; nor give the law to the jury more than once.—*Topeka v. Tuttle*, 5 Kan. 312.

In *Magniac v. Thompson*, 7 Pet. 348, 395, the question was whether, under all the circumstances,

certain marriage articles were void as a fraud upon creditors. With reference to this point, the judge who delivered the charge to the jury, made, among others, the following remarks:

"To taint a transaction with fraud, both parties must concur in the illegal design. It is not enough to prove fraud in the debtor. He may lawfully sell his property, with the direct intention of defrauding his creditors, or prefer one creditor to another. But unless the purchaser or preferred creditor receives the property with the same fraudulent design the contract is valid against other creditors or purchasers, who may be injured by the transaction. Before you can pronounce this marriage agreement void and inoperative on the ground of actual fraud, you must be satisfied not only that the defendant made it with design to defraud his creditors, but also that Mrs. Thompson and her father and trustee, Mr. Richard Stockton, *participated* and concurred in the fraud intended. The deeds, gifts, grants or other contracts, which the law avoids, are those made with intent to defraud, hinder, delay or injure creditors; and in order to avoid them, both the party giving and the party receiving must *participate* in the fraud. The words of the law (the statute of 13 Elizabeth, ch. 5,) requires that both parties must concur in the fraud in order to bring the same within the provisions."

In that case, counsel for plaintiffs raised the identical objection to the charge quoted, as was made by these defendants in the circuit court of appeals to the instruction under consideration, and this court by *Mr. Justice* Storey said with reference thereto, that:

"Nothing can be clearer, both upon principle and authority, than the doctrine that to make an antenuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of the intended fraud. If the settler alone intend a fraud, and the other party have no notice of it, but is innocent of it, she is not, and cannot be affected by it. * * * The husband and wife, parties to such a contract, are therefore deemed in the highest sense purchasers for a valuable consideration; and so that it is *bona fide*, and without notice of fraud, brought home to both sides, it becomes

unimpeachable by creditors. Fraud may be imputed to the parties, either by direct co-operation in the original design at the time of its concoction, or by constructive co-operation from notice of it, and carrying the design, after such notice, into execution.

The argument at the bar admits these principles to be incontrovertible. But it is supposed by the counsel for the plaintiffs in error that the charge contains a different and broader doctrine; that it requires *active co-operation preconcert* and *participation* in the original design of fraud; and that *notice of it is not sufficient* to avoid the settlement, although all the parties, after such notice, proceed to execute it."

"It appears to us that this is an entirely erroneous view of the scope and reasoning of the charge, even in the passages above cited. But taking them in connection with other passages in the same charge, it is beyond doubt that no such distinction was in the mind of the court, or was, in fact, uttered to the jury. * * * But the charge does, in various other passages, distinctly point out to the jury the very doctrine which the plaintiffs in error assume as the basis of their argument, and for which they contend. Thus, in commenting upon the different classes of conveyances, to which the statute of 13 Elizabeth is applicable, it is observed that all conveyances are valid and accepted which are 'for a valuable consideration, in good faith, without notice by the person receiving the conveyance of any fraud, covin or collusion.' * * * And, without dwelling on other passages equally expressive, it is added in the very close of the charge, 'We conclude, then, with instructing you, that a settlement made before marriage makes the intended wife a purchaser for a valuable consideration; if agreed to be made, she is a creditor, and protected in the enjoyment of the thing settled, and entitled to the means of enforcing what is executory, if the transaction was *bona fide* and without notice of fraud.' That these directions are correct in point of law cannot admit of doubt, and that they cover the whole ground asserted in the argument for the plaintiffs, seems equally undeniable. We may, then, dismiss any further commentary on this part of the case."

In this connection, we wish to further call this court's attention to the case of *Freiberg et. al., v. Johnston, et. al., supra.* It was upon a statutory mo-

tion by appellants, Freiberg *et. al.*, against Johnston, ex-sherfff, and the sureties on his official bond, to recover for the injury alleged to have been sustained by appellants by reason of Johnston's failure to account for a stock of goods which had been seized by him as sheriff, under a writ of attachment theretofore issued at the suit of appellants against one H. Heyman. Appellees set up, among others, the defense that the goods levied on did not belong to Heyman, but belonged to Dwyer & Turner, who had purchased them from Heyman before the levy. To this, appellants replied, that if there was any sale of the goods from Heyman to Dwyer & Turner, it was fraudulent and void, because made with intent to defraud appellants and other creditors of Heyman, of which Dwyer & Turner either had notice or could have known by the use of ordinary diligence. Judgment for appellees. The third assignment of error was that,

"The court erred in charge *second*, in instructing the jury that they should find for the defendant if they believed there was no *intent on the part of Dwyer & Turner* to hinder, delay, or defraud the creditors of Heyman, in this: that the charge leaves the jury to conclude that there must be *actual intent* on the part of Dwyer & Turner to hinder, delay, or defraud, *and that no knowledge of such facts as would put reasonable men on inquiry would render the sale void* as against the creditors of Heyman. In other words, the charge is erroneous in leading the jury to conclude that the debtor and grantee must be actuated by the same motive to render a sale fraudulent and void."

As to this, the supreme court said:

"Immediately preceding the second sub-division of the charge, against which this assignment is directed, the court charged the jury as follows: 'Every conveyance or transfer of property, made with intent to hinder, or delay, or defraud creditors, shall, as to such creditors, be void; but this will not affect the title of a purchaser for a valuable consideration unless it appears that he had notice of such fraudulent intention, or might have known of such intent by the use of ordinary care and diligence.' Again, in sub-di-

vision 5, the court instructs the jury as follows: 'It is sufficient to affect Dwyer & Turner with notice of the fraudulent intent of Heyman (if he had it) if, by ordinary diligence, they might have known Heyman's condition and probable reasons for selling, or if they, at the time of or immediately prior to said sale, had knowledge of such facts as were calculated to create a suspicion in their minds that Heyman was actuated by a fraudulent intent in making the sale, and to put them upon inquiry in regard to his motives for selling, then such sale would, as to creditors, be void.' The sub-division of the charge complained of under this assignment, considered with reference to the portions of the charge just quoted, is not erroneous."—71 Tex. (sup. ct.) 558, 9 S. W. Rep. 455, 457, 458.

In conclusion, then, we submit, that when this, and the other instructions complained of on the same ground, are considered, as they must be, in connection with the eleventh and twelfth paragraphs of the charge, the complaint of counsel is groundless.

SIXTH.

We have now considered all the alleged errors in their order, as embraced and set out in the assignment of errors in this court, except the ninth and tenth, which are, that the court erred in overruling defendants' motion for a new trial, and in rendering judgment for plaintiffs upon the verdict.

With respect to these two alleged errors, it is sufficient to say that neither of them can be assigned for error in the circuit court of appeals or in this court.

Edge Moor Bridge Works v. Fields, (C. C. A.) 58 Fed. Rep. 173.

Little Josephine Min. Co. v. Fullerton, (C. C. A.) Id. 521.

Van Stone v. Stillwell & Brice M'f'g. Co., 142 U. S. 128.

CONCLUSION.

In the preparation of this brief, we have been at a disadvantage inasmuch as we have not had the benefit of a brief of the argument which defendants intend to make in this court. We have, therefore, presented our side of the case, as best we could, in view of defendants' contention in the court of appeals; and in doing so, we have noticed only such of the exceptions contained in the record, as are embraced within the assignment of errors in this court, supposing that none others will be urged here, or that if they are, this court will not notice them.

Counsel, in the close of his argument in the circuit court of appeals, vigorously contended that defendants did not have a fair trial, and in confirmation of his claim pointed to the third paragraph of the charge wherein, the jury were told that plaintiffs had to establish their claim (the purchase of the goods from Cannon, etc.) by a fair preponderance of the evidence, whereas, in the fifth paragraph, the jury were charged that defendants must make out their defense, (show fraud) by "satisfactory proof."

The distinction here attempted to be drawn consists, as we think has been shown, in words rather than substance. But the difference, however, in the degree of proof required of the parties to sustain their respective claims, if indeed, there is, upon a fair and reasonable interpretation, a difference indicated in these paragraphs of the charge—is one sanctioned by some of the most respectable authors aud courts in the land.

We have seen that the supreme court of Kansas

has said that fraud must be shown by "satisfactory proof," and that this statement of the law by the Kansas court was afterwards approved by this court. We have also seen that Bigelow, in his treatise on the law of fraud, and the supreme court of Massachusetts, and other courts and authors, have said, and not without reason, that, as the charge of fraud is a charge against a presumption of fact, somewhat stronger evidence is required to prove it than would suffice to prove a sale, the delivery of a chattel and the like. This doctrine is expressly laid down in *Hatch v. Bayley*, 12 Cush. 30, which case is referred to and cited with approval by this court in *Jones v. Simpson*, 116 U. S. 615. So, if it be conceded that the court by these subdivisions of the charge really intended to express to the jury the necessity of a somewhat higher degree of proof to sustain the allegation of fraud, than that required in establishing a sale etc., it was not without precedent for the position.

We wish to say here, that it does not seem to us that counsel was as open and frank with the trial court as he should have been; else, if the instructions were couched, as he supposed, in language so broad as to possibly mislead the jury to defendants' prejudice, he would have called the judge's attention to the matter at the time and before the jury left the bar; and we insist that, for not having suggested such modifications and limitations, as appeared to him proper to be made, and finally, for not having made some of his exceptions specific instead of general, whereby, certain alleged objectionable matter was not pointed out to the court, he is himself to blame, if, indeed, injury has resulted to defendants.

An examination of the entire bill of exceptions will show that very nearly the whole of defendants' defense at the trial was, their objections and exceptions. The record shows that they commenced ob-

jecting at the empanneling of the jury, saving numerous technical and frivolous exceptions to the qualifications of the jurors; and from that on, to the close of the trial, it seemed with them more of a struggle to secure error than to obtain a verdict.

In conclusion, we submit, that the decision of the circuit court of appeals was right, and that its judgment should be affirmed.

Respectfully submitted,

A. P. JETMORE,
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Counsel for Defendants in Error.

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(15,484)

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1895.

NO. 316.

R. L. WALKER, JAMES McMURRAY, CHARLES HOWARD, AND A. J. PARTRIDGE, *Plaintiffs in Error*,

vs.

E. COLLINS AND W. H. BRETCH, (PARTNERS AS COLLINS & BRETCH,) *Defendants in Error*.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR ON QUESTION OF JURISDICTION

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SUPPLEMENTAL

BRIEF OF DEFENDANTS IN ERROR

ON QUESTION OF JURISDICTION AND COSTS.

Since this case was tried and decided the last time by the Circuit Court of Appeals, this court in *State of Tennessee v. Bank of Commerce*, 152 U. S. 454, so interpreted the act of 1887, as amended in 1888, as to make it very doubtful whether the circuit court had jurisdiction of the case at bar. And though the plaintiffs in error (defendants in the state court)

filed their petition and bond for the removal of the case to the circuit court, presumably for the reason that they hoped for better success in the latter court, yet, since their defeat in that court on the merits, they now, for the first time, as the record will show, question the jurisdiction of the court which assumed to try the case at their solicitation.

Of course, if the circuit court did not have jurisdiction, the question can be raised as well by the parties who invoked the jurisdiction of that court, as by those who opposed it, and we do not mean to contend that because plaintiffs in error sought to try their case in the circuit court they are therefore estopped to now question its jurisdiction. But we do oppose the claim of plaintiffs in error that we should pay the costs in the event this case is reversed for want of jurisdiction of the Federal Courts.

The record (pp. 5, 7,) shows that this cause was commenced by defendants in error, in the District Court of Harvey County, Kansas, and that afterwards, (record pp. 11, 13,) plaintiffs in error filed their petition and bond for removal on the ground that the action and defense thereto *arises under the laws of the United States.* It also appears, (record p. 14,) that on May 28, 1890, the state court allowed such application and petition for removal, and that thereupon, the cause was removed on said petition and bond.

We do not deny that previous to May 28, 1890, the day when said order allowing the removal was made, the state court, in our absence, had denied this application for removal, and that we served notice that we would call the matter up for further consideration; but we do deny the gratuitous state-

ments of counsel to the effect that upon such further hearing, the plaintiffs in error announced to the court that they would waive their rights under their petition for removal; that they desired to withdraw such petition and bond, and objected to any order of removal being made. We also deny that, upon such further hearing, the court addressed counsel as claimed in plaintiffs' brief, (commencing at bottom of p. 19), and we believe the quoted language to be a mere invention of counsel. At any rate, we have no recollection whatever of such a statement by the court. Upon what principle or for what reason the court should refuse to permit the record to show that the case was removed upon *our application*, if such were the fact, as is asserted by counsel and attempted to be shown by the pretended language of the court, is difficult to understand. It is quite as difficult of belief that the court arbitrarily refused to permit the record to show that plaintiffs in error objected to the removal, and that they expressly waived their rights under their petition for removal and asked leave to withdraw the same, if, indeed, such were the truth, as claimed by counsel in his brief at p. 19.

According to counsel's statement of the case, plaintiffs in error filed their petition and bond for removal, which, being at first denied, they afterwards, upon the court's reconsideration of the matter, seriously objected to its allowance and went so far as to beg leave to witdraw the same entirely. That the court not only refused such leave and overruled their objection to the removal, but refused to permit the record to speak the truth, and having removed the cause at *our* request and over their objec-

tion, made the record recite a falsehood by the following language: "and said application and petition (application and petition of plaintiffs in error) for removal is hereby allowed by the court, the *plaintiffs* (defendants in error) interposing no objection thereto."—Record, p. 14. No such perverseness on the part of the state court appears from the record, and surely it will not be inferred except on the clearest showing.

Again, it is a reasonable supposition that having selected our forum by the voluntary commencement of the action in the state court, we would be willing to go to trial there; and while, of course, the opposite parties having in the meantime initiated proceedings to remove to the Federal court, it became a question as to whether that or the state court could thereafter rightfully proceed, yet, when such parties were willing to withdraw their petition and bond for removal and thereby illiminate such question from the case, it is wholly unreasonable to suppose that we should insist on keeping it in.

When this petition and bond for removal were filed by the defendants, we knew, or at least we believe from our limited knowledge and experience in the federal practice, that if the case was really removable, the jurisdiction of the circuit court at once attached by the mere filing of the petition and bond and that no matter what course the state court might persue, the circuit court would and could not thereby be deprived of such jurisdiction. It was also our idea that the courts of the United States were the rightful and exclusive judges of their own jurisdiction, and that therefore it was safer and more prudent when application was made to the state court

for the removal of a case to the Federal court, to interpose no objection, let it be removed, and then raise the question there by motion to remand. We deemed this the better course, not only because the Federal court would likely be more familiar than the state court with the extent of its own jurisdiction, but also for the reason that if the motion to remand should be sustained that would be the end of the question. With this in view, we had determined, when the petition for removal in this case should come up for its action thereon, to announce to the state court that we had no objection to its allowance, but the matter was called up and passed on by that court in our absence, and the court supposing that we, as a matter of course, were opposed to the removal, denied the application. When we discovered what had been done, we called the court's attention to our view of the matter, and that it had not been our intention to oppose the application in that court, whereupon, the judge informed us that if he had known that there was no opposition to the removal, he would have allowed the petition, and announced that he would do so yet, if we would notify defendants' counsel and have them present in court, which we did by the notice contained in the record at pp. 13, 14. Defendants' counsel being in court in pursuance to that notice, we stated to the court in their presence that we had no objection to the allowance of their petition for removal, and had had no intention to object to it in that court; and thereupon the court rescinded its former order denying the petition and allowed the same, as appears by the order of that court, at p. 14 of the record. The defendants not only did not object to this order, but caused a

copy of the record to be made on May 31, 1890, and lodged the same in the circuit court June 2d following, and in two days thereafter, we filed in that court our motion to remand the cause to the state court, as will appear from the record at p. 15.

It is true, that the record in this court does not show that our motion to remand was ever directly passed on, and it may be true that the record in the circuit court fails to show it, but it is not true, as stated by counsel, that it was not pressed to a hearing, for the writer of this remembers well the embarrassment he suffered when, on the argument, the court put some questions concerning the jurisdiction of Federal courts, which, on account of our scant knowledge and inexperience concerning the matter, we were wholly unable to reply to. The motion to remand was heard at the November 1890 term of the court and taken under advisement, and the case (as shown in the record, top of p. 16,) was then, by stipulation, "continued generally to the next term, *unless remanded.*"

This is the entire extent of our interference in behalf of the removal of this case from the state to the circuit court. Of course, a good deal of what we have said here, is, like much of the opposing counsel's statement, outside of the record, and can only be justified, if at all, on the ground that silence on our part might possibly lend countenance to some of the assertions of counsel concerning the conduct of the state court as well as ourselves, in reference to the removal of this case into the circuit court.

It appears clearly enough from the record, that it was the defendants (plaintiffs in error) who initiated the proceedings for removal, and that the

case was removed on their petition and bond; and therefore, if all the proceedings in the several Federal Courts are to be held for naught on the ground of want of jurisdiction, they are the parties who ought, in justice, to be required to pay the costs made in those courts.

Respectfully submitted,

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